APPENDIX A — OPINION OF THE FIRST CIRCUIT COURT OF APPEAL FOR THE STATE OF LOUISIANA DATED DECEMBER 31, 2003

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NUMBER 2000 KA 1664

STATE OF LOUISIANA

VERSUS

PANOS TSOLAINOS

Judgment Rendered: December 31, 2003

Appealed from the Twenty-Second
Judicial District Court
in and for the Parish of St. Tammany,
State of Louisiana
Case Number 290874

Honorable Donald M. Fendlason, Judge

BEFORE: FOIL, FITZSIMMONS, AND GAIDRY, JJ.

FITZSIMMONS, J.

Defendant, Panos Tsolainos, originally was charged by grand jury indictment with the first degree murder of his ex-wife, Deborah Tsolainos, a violation of La. R.S. 14:30. The state subsequently amended the indictment to charge defendant with second degree murder, a violation of La. R.S.

Appendix A

14:30.1. Defendant entered a dual plea of not guilty and not guilty by reason of insanity. The trial court appointed a sanity commission. Following a hearing, the trial court found the defendant competent to stand trial. The issue of the defendant's sanity at the time of the commission of the offense was left for the jury to decide. Defendant moved for a change of venue, which the trial court denied. Subsequently, defendant was tried by a jury, and convicted as charged. The trial court denied defendant's motion for a new trial and post-verdict judgment of acquittal. Defendant was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

Defendant now appeals, urging the following assignments of error:

1. The evidence presented to the jury was constitutionally insufficient to sustain a conviction for second degree murder. The errors include, but are not limited to:

   (a) Clarissa Tsolainos admitted she perjured herself at the time of trial, which was confirmed by the conflicts between her testimony and the physical evidence;

   (b) The District Court denied Mr. Tsolainos's Motion in Limine requesting leave to speak with Ms. Tsolainos after she requested such a meeting;

   (c) The record as a whole reveals that there is no legally recognizable basis for sustaining a second degree murder conviction.

Appendix A

2. The conviction in this case must be overturned because Mr. Tsolainos did not receive the constitutionally mandated fair and impartial trial. The errors include, but are not limited to:

   (a) The District Court erred in denying Mr. Tsolainos's Motion for a Change of Venue which was supported by extensive expert testimony and polling data;

   (b) The voir dire of prospective jurors in this case was rendered defective by the District Court's failure to permit appropriate detailed individual questioning of jurors after the uncontroverted expert polling data reflected an inherent prejudice by the potential jurors;

   (c) The District Court improperly denied challenges for cause against certain jurors who, as supported by the pretrial publicity, the uncontradicted expert testimony, and polling data, were prejudiced by the pretrial publicity such that they were not forthcoming under the circumstances and held a significant bias/taint against Mr. Tsolainos;

   (d) The District Court's denial of challenges for cause, after Mr. Tsolainos exhausted his peremptory challenges, and despite the expert testimony and polling data which revealed extensive adverse pretrial publicity, resulted in legally presumed prejudice against Mr. Tsolainos;

(e) The jury panel was tainted by the failure of a juror, Mark Berryhill, to admit his relationship with a "witness" and to disclose an acrimonious divorce despite direct questioning on the topic and this special significance to the circumstances of this case.

3. The District Court erred in admitting the state's **Prieur** evidence. The errors include, but are not limited to:

(a) The District Court erred in allowing the state to attempt to prove the existence of a conspiracy based solely on hearsay statements;

(b) The District Court erred in finding that the "agreement" stage of a conspiracy was satisfied by a drug dealer's (Gerald Branigan) solicitation of Mr. Tsolainos;

(c) The District Court erred in finding that confidential police informant (Charles "Tinker" Schmolke) was ever a member/participant in any conspiracy;

(d) The District Court erred in finding that there was an affirmative act in furtherance of the alleged conspiracy by any of the alleged participants;

(e) The District Court erred in admitting a recorded hearsay conversation between Messrs. Branigan and Schmolke and in finding that it alone was

sufficient to constitute an affirmative act in furtherance of an alleged conspiracy;

(f) The District Court erred in allowing, for the first time in Louisiana, the existence of a conspiracy to be proven solely on the basis of hearsay and where the party against whom the evidence was sought to be used was denied the right of confrontation against the alleged co-conspirators;

(g) The District Court erred in allowing any of the three "Kell" tapes to be played, or referred to, at trial, especially where Mr. Schmolke admittedly was not a member of any alleged conspiracy at the time the recordings were made;

(h) The District Court erred in refusing to grant a mistrial after admitting the first "Kell" recording and then reversing its position and striking the two subsequent conversations. This is particularly true since the District Court, over Mr. Tsolainos's objection, allowed the jury to hear the first "Kell" tape prior to its ruling on the second two. Further, repeated references were made to the excluded tape recordings by the state and state's witnesses.

4. The District Court erred in allowing taped prejudicial hearsay statements from Messrs. Branigan and Schmolke to be played for the jury when

Mr. Tsolainos was unable to confront them because Mr. Schmolke committed suicide shortly prior to trial and Mr. Branigan asserted his Fifth Amendment privilege against self-incrimination. The errors include, but are not limited to:

(a) The District Court denied Mr. Tsolainos his constitutional right to confront the witnesses against him;

(b) The District Court improperly denied Mr. Tsolainos his right of confrontation by denying a continuance of the second degree murder trial until after the conspiracy trial, which would have allowed Mr. Tsolainos to confront Mr. Branigan and also resolve the legal issues of the conspiracy as admitted into the instant trial as evidence;

(c) In addition to prejudicing Mr. Tsolainos on these issues, the District Court's refusal to exclude all of the "Kell" transmissions and grant Mr. Tsolainos's motion for a mistrial, not only prejudiced him with respect to consideration of the *Prieur* issue, but also denied him his right to confrontation of witnesses against him.

5. The District Court erred in allowing evidence of Mr. Tsolainos's past drug use to be introduced at the time of trial. The errors include, but are not limited to:

Appendix A

(a) The District Court erred in allowing members of a court-appointed sanity commission to exceed their mandate and essentially testify as state consultants. Those doctors then utilized statements made during the course of the confidential sanity proceedings as substantive evidence against him on the issue of guilt or innocence;

(b) The District Court erred in admitting photographs of drug paraphernalia in the Tsolainos's home to be introduced for the express purpose of implying that Mr. Tsolainos was a drug abuser when he in fact had not lived in the house for weeks prior to the incident at issue;

(c) The District Court erred in admitting evidence of Mr. Tsolainos's prior drug use in the absence of **Prieur** notice;

(d) The District Court erred in allowing evidence of Mr. Tsolainos's past drug use when every mental health professional who testified at the time of trial indicated that any drug use would have had no effect on his mental state at the time of the incident in question.

6. The District Court erred in refusing to grant Mr. Tsolainos's Motion for New Trial based upon newly discovered evidence pursuant to La. Code Crim. P. art. 851(3). This issue is reviewable because

the District Court abused its discretion in denying the motion and, as such, error of law is presented. The errors include, but are not limited to:

(a) The District Court applied the wrong legal standard to the Motion for New Trial. The District Court acted as a "thirteenth juror" instead of considering whether a second jury, based on the newly discovered evidence, would have reached a different result and if the new evidence would change the dynamics of the trial;

(b) The District Court erred by holding that Clarissa Tsolainos's perjury concerning her mother's alcohol consumption on the date of her death was immaterial;

(c) The District Court erred in finding that Clarissa Tsolainos's perjury presented only issues of credibility rather than directly affecting the substantive evidence which the jury had to consider;

(d) The District Court erred in failing to grant the Motion pursuant to **State v. Cherry** and **State v. Watts**, where the two principal witnesses were Clarissa Tsolainos, who was an admitted perjurer, and George Deforrest, who was offered $20,000 or a new truck for his testimony; and especially where multiple disinterested witnesses testified at the Motion for New Trial hearing that Clarissa Tsolainos (1) told them

that George Deforrest had lied for her at the trial, including his statement that he heard the one incriminating statement by Mr. Tsolainos, and (2) told them that she had to buy George Deforrest a new truck or give him $20,000 because he lied for her.

7. The jury verdict should be overturned because of multiple **Brady** violations by the state. The specific violations are fully set forth in Mr. Tsolainos's briefing of this error.

8. The District Court erred in admitting Mr. Tsolainos's statements.

9. The District Court erred in failing to quash Mr. Tsolainos's indictment.

10. Mr. Tsolainos specifically requests that this court review the entire record of this proceeding for errors patent, which would warrant overturning the verdict in this case.

Finding no merit in any of the assigned errors, we affirm the defendant's conviction and sentence.

FACTS

On the evening of July 19, 1998, at approximately 8:00 p.m., Clarissa Tsolainos called 911 from her home on Morgan Bluff Road in Pearl River, Louisiana. She requested emergency medical assistance for her mother, Deborah Tsolainos (the victim). Clarissa informed the operator that

her father, the defendant, had run over the victim with a vehicle. Clarissa explained that the victim was stuck beneath the vehicle and needed immediate assistance. Clarissa further indicated that the defendant also hit her and her younger sister, Stephanie, with the vehicle.

St. Tammany Parish Sheriff's officers and Fire District personnel responded to the call. Upon arriving at the residence, sheriff's officials found the victim's lifeless body partially wedged beneath an overturned 1993 Buick Skylark. The vehicle was positioned at an angle, with the passenger side on top of the victim's neck and shoulder area. Despite all rescue efforts, Mrs. Tsolainos was pronounced dead shortly thereafter. The defendant, who was still present on the scene, was arrested and subsequently indicted for murder.

ASSIGNMENT OF ERROR NUMBER ONE
SUFFICIENCY OF THE EVIDENCE

In his first assignment of error, the defendant asserts that the evidence presented at trial was insufficient to support the second degree murder conviction. More particularly, defendant argues that the state failed to prove he specifically intended to kill or to inflict great bodily harm upon the victim. Defendant claims he accidentally struck the victim when he misapplied the vehicle's controls while attempting to leave the area.[1]

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1. In connection with this assignment of error, the defendant also argues that new evidence, discovered after trial, indicates that several prosecutorial witnesses presented perjured testimony before the jury. This testimony, the defendant contends, renders the state's

(Cont'd)

Appendix A

Standard of Review

The standard of review for the sufficiency of evidence is whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the state proved the essential elements of the crime beyond a reasonable doubt. La. Code Crim. P. art. 821. This standard of review, in particular the requirement that the evidence be viewed in the light most favorable to the prosecution, obliges the reviewing court to defer to the actual trier of fact's rational credibility calls, evidence weighing, and inference drawing. **State v. Mussall**, 523 So.2d 1305, 1308-11 (La. 1988). Thus, the reviewing court is not permitted to decide whether it believes the witnesses or whether the conviction is contrary to the weight of the evidence. **State v. Burge**, 515 So.2d 494, 505 (La. App. 1st Cir. 1987), *writ denied*, 532 So.2d 112 (La. 1988); *see* **State v. Houston**, 98-2658, p. 5 (La. App. 1st Cir. 9/24/99), 754 So.2d 256, 259.

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overall evidence insufficient. Because this portion of the defendant's argument deals with evidence that was not presented to the jury at trial, this argument will be addressed with assignment of error number six, wherein the defendant challenges the trial court's ruling on his motion for a new trial. For the purposes of this assignment, we will consider only the evidence actually introduced before the jury at trial.

The defendant also assigns as error the trial court's denial of his motion in limine requesting leave to speak with Clarissa Tsolainos. However, he failed to articulate the basis for the alleged error, or cite supporting record references or law in his appellate brief. Thus, we did not consider the correctness of the denial. *See* Uniform Rules Courts of Appeal, Rule 2-12.4.

Appendix A

Louisiana Revised Statutes 14:30.1 A(1) provides, in pertinent part, that second degree murder is a killing that occurs "[w]hen the offender has a specific intent to kill or to inflict great bodily harm. . . ." Thus, the state was required to prove, beyond a reasonable doubt, that the killing was done with specific intent to kill or to inflict great bodily harm.

Specific criminal intent is defined as "that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." La. R.S. 14:10(1). Specific intent need not be proven as a fact, and may be inferred from the circumstances present and the actions of the defendant. Specific intent is a legal conclusion to be resolved ultimately by the trier of fact. **State v. Carter**, 96-0337, p. 3 (La. App. 1st Cir. 11/8/96), 684 So.2d 432, 434-35.

Trial Testimony of Clarissa Tsolainos

At trial, Clarissa Tsolainos, the defendant's adopted daughter (the biological daughter of the victim), testified for the state. In her testimony, Clarissa indicated that she personally observed the incident. Clarissa provided a detailed account of the events leading to the tragic incident. She also provided pertinent background information on the Tsolainos's familial situation.

Clarissa testified that she and her older sister, Melissa Tsolainos, were the biological children of the victim and had been adopted by the defendant when they were very young.

The victim and the defendant later had two children together, Stephen and Stephanie Tsolainos.[2]

Clarissa testified that she loved the defendant and considered him to be her father. According to Clarissa, the defendant and the victim enjoyed what Clarissa considered to be a "great" marriage, that is, until the victim became addicted to prescription drugs after a back injury. After years of struggling with the victim's drug addiction, which ultimately escalated from prescription pain medications to heroin, the defendant separated from the victim in 1996 and eventually filed for a divorce. The defendant maintained sole custody of the children and use of the Morgan Bluff Road residence.

After the divorce, the victim moved to St. Louis, Missouri, to be closer to her family. Clarissa originally remained in Pearl River with the defendant, but she eventually moved to St. Louis with the victim. Clarissa lived with the victim for approximately one year immediately preceding the incident in question. Clarissa stated that the victim had turned her life around and was clean and sober during the time that she lived with her. Clarissa claims the victim was gainfully employed and drug-free.

According to Clarissa, the victim and the defendant were involved in ongoing disputes regarding the custody of Stephen and Stephanie, and settlement of the community property. On several occasions, Clarissa returned to Louisiana with the victim to attend family court proceedings on

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2. The record establishes that Stephen and Stephanie Tsolainos were minors at the time of the incident in question.

these issues in St. Tammany Parish. At a hearing on Friday, July 17, 1998, while the defendant was in jail on charges alleging that he had conspired to kill the victim, the victim was awarded custody of the minor children and temporary use of the Morgan Bluff Road residence.

The following day, Saturday, July 18, 1998, Clarissa and the victim worked all day cleaning the residence, which appeared to have been trashed. Clarissa testified that the victim had been in a good mood all day because she had finally gained custody of her young children. Later that evening, the victim went out with her sister, Carlotta. Clarissa testified that the victim returned in approximately one to two hours.

On Sunday, July 19, 1998, Clarissa, the victim, and Clarissa's friend, George Deforrest, continued cleaning the Morgan Bluff Road residence. At approximately noon, Connie Deville, the defendant's girlfriend, arrived at the residence in her mother's 1993 Buick Skylark. Connie had come to retrieve some personal property she and the defendant had stored at the residence. Clarissa and the victim helped Connie pack some of her things into the Skylark. Shortly thereafter, the victim learned that the defendant had come with Connie and was waiting for her across the street from the residence. The victim was initially startled by the defendant's presence, but later decided to bring Stephen and Stephanie out to the street to meet with their father. The victim and the children visited with the defendant for approximately fifteen minutes. The victim then returned to the residence and informed Clarissa that the defendant wanted to see her. Clarissa also went out to the street and visited

with the defendant. Eventually, without any objection by the victim, the defendant came onto the property and assisted Connie in loading the vehicle. Once the vehicle was full, the defendant and Connie left the area.

Clarissa testified that later that evening, at approximately 6 p.m., as she and the victim prepared to eat dinner, the defendant and Connie returned to the residence. Because the victim was already aware that the defendant and Connie would be returning to the residence, she did not object to the defendant's presence on the property. Instead, the victim went outside and assisted the defendant and Connie with their things. According to Clarissa, the scene was amicable. In fact, at some time during the visit, the victim told Clarissa that the defendant and Connie "looked cute together."

Later, as Clarissa and George Deforrest continued cleaning the residence, they heard a loud noise outside. As Clarissa ran outside to determine the source of the noise, she heard the engine of the Skylark being revved, as if the defendant, whom Clarissa observed seated in the driver's seat, was depressing the accelerator. Connie was also inside the vehicle, seated on the passenger side. Outside the vehicle, the victim was yelling and banging on the vehicle's hood. The victim was verbally demanding that the defendant vacate the property. According to Clarissa, the victim was very angry and was yelling so much her face was turning red. The victim eventually approached the passenger side of the vehicle and began to hit on the window. Clarissa stated that the victim told Connie that she could come back, but the defendant was no longer welcome on the property.

Appendix A

Clarissa testified that when she approached the victim and questioned her about her actions, the victim "jerked" Clarissa, practically lifted her off of her feet, and told her to "Get the 'f' back inside." Clarissa and the victim began to struggle. As she struggled with the victim, Clarissa observed the vehicle begin to move backwards. While the vehicle was backing up, Connie Deville attempted to exit, and fell to the ground. Then, with Connie outside the vehicle, the defendant pressed the accelerator, aimed the vehicle at the victim, and rapidly proceeded forward, striking the victim in the middle. Because the victim had pushed Clarissa away, the vehicle only grazed Clarissa. Clarissa claims the vehicle also hit Stephanie.

Clarissa testified that after the initial impact, the victim landed on the hood of the Skylark. The vehicle continued to accelerate and eventually hit a tree. The force of the impact threw the victim off the hood and onto the ground. The vehicle flipped over and landed on the victim's head.

Clarissa immediately ran inside and called for assistance. Moments later, when she returned to the yard, Clarissa noticed that the defendant was no longer inside the vehicle. According to Clarissa, when she asked the defendant to help her move the vehicle off the victim, the defendant calmly responded, "she's dead, she's dead, she's dead, she's dead."

Clarissa returned inside and called for help again. When the defendant overheard Clarissa stating that her dad had just "killed" her mom, he approached Clarissa and told her to tell the operator the incident was an accident. He claimed, "it's the emergency brake, it's the emergency brake. It was

the emergency brake, Clarissa, the damn car's emergency brake..." Clarissa further testified that Connie Deville told her, "Clarissa, you have got to tell them it was the emergency brake, the emergency brake."

Trial Testimony of George Deforrest

George Deforrest, who was at the Morgan Bluff Road residence with Clarissa on the day in question, also testified for the state. Deforrest stated that the defendant and Connie Deville visited the residence twice that day. The first visit took place around noon and was uneventful. The defendant eventually came onto the property, but only after the victim and Clarissa came out to visit him across the street. The victim did not object to the defendant's presence on the property. Connie and the defendant gathered what they could fit in the vehicle, indicated that a return trip would be necessary, and left the area.

Later that same evening, Connie and the defendant returned to the residence. They parked the Skylark in front of the opened garage door. While the victim and Connie stood talking nearby, the defendant loaded items into the vehicle. Deforrest testified that the atmosphere was friendly and everyone was getting along well.

While Deforrest and Clarissa were inside the house, they heard the victim's voice screaming outside. Deforrest testified he also heard "tires squealing." Clarissa ran out to investigate and Deforrest followed her shortly thereafter. Upon walking through the interior door of the residence that opens into the garage, Deforrest observed the Skylark backing up. The

defendant was seated in the driver's seat, and Connie Deville was on the passenger side. Deforrest observed Connie Deville fall to the ground when she attempted to step out of the moving vehicle. The victim was outside the vehicle yelling and screaming at the defendant. After backing up for approximately twenty feet, the vehicle came to a stop, the engine "revved up," the tires squealed, and the vehicle proceeded forward. According to Deforrest, the vehicle rapidly moved forward and struck the victim. The victim landed on the hood, and the vehicle continued past the garage opening. As the vehicle moved past the garage, the sound of the accelerated engine continued. Deforrest testified there was no sound of the vehicle's brakes ever being applied.

Deforrest then ran from his position inside the garage area out into the yard where he observed the vehicle resting on its passenger side with the victim wedged beneath. Deforrest ran inside to call for help and Clarissa ran in behind him. Clarissa took the telephone and instructed Deforrest to go and help the victim.

Deforrest returned to the vehicle to assist the victim. Shortly thereafter, Deforrest observed the defendant climbing out of the driver's side of the vehicle. Deforrest testified that as he attempted to remove the vehicle using a jack, he heard the defendant say, "that f-ing bitch got what she deserved, she shouldn't have been running her f-ing mouth off."

Deforrest continued his attempts to extricate the victim and eventually asked the defendant for assistance. The defendant did not respond to the request. Deforrest continued his rescue efforts until the police and rescue

personnel arrived. Shortly thereafter, Deforrest gave a taped statement describing the incident to Detective Robert Juge of the St. Tammany Parish Sheriff's Office.

Trial Testimony of Coroner

The state also presented the testimony of Dr. Fraser Mackenzie, a forensic pathologist with the Jefferson Parish Coroner's Office. Dr. Mackenzie performed an autopsy on the victim on July 20, 1998, wherein he noted numerous injuries, which included abrasions on the left shoulder area, left buttocks, scattered on the abdomen, and left lower leg. Dr. Mackenzie also noted fractures of the posterior first through fourth ribs on the right side. There was blood in the right chest cavity, which Dr. Mackenzie attributed to the breakage of the ribs. The victim's right upper arm was fractured. Dr. Mackenzie opined that the bruising of the victim's arm and ribs was consistent with the photographs depicting the victim wedged beneath the vehicle with her right arm and shoulder in a "very awkward position."

As for the cause of the victim's death, Dr. Mackenzie noted that the position of the heavy vehicle over the torso portion of the victim's body would have prevented the chest from expanding, making it impossible for the victim to breathe. The inability to breathe would have prevented the victim from getting any oxygen into her blood. Dr. Mackenzie also noted that the victim's carotid artery was severed, an injury that would have caused the victim to bleed to death. Dr. Mackenzie opined that severed arteries are usually caused by deacceleration, meaning the body stops, but the inside organs do not. Severing of the carotid artery is consistent

with the victim's body being thrown from the car and onto the ground. Dr. Mackenzie stated that the aforementioned injuries, although potentially fatal, would not have resulted in the victim's death instantaneously. The victim could have lived approximately three to five minutes with each of the injuries. Considering the facts and circumstances surrounding the incident, Dr. Mackenzie ruled the victim's death a homicide.

Dr. Mackenzie further testified that in connection with the autopsy, he collected blood and urine samples from the victim to determine toxicology. The results showed no evidence of marijuana, cocaine, or opiates (heroin). The results did, however, reveal the existence of alcohol in the victim's blood. Dr. Mackenzie testified that the victim's blood alcohol level at the time the sample was collected was .07. This finding, according to Dr. Mackenzie, is inconsistent with someone who had nothing to drink in the twenty-four hours immediately preceding death. Instead, Dr. Mackenzie testified, the finding suggests that the victim consumed approximately four to five beers within an hour of her death.

Evidence on Previous Conspiracy to Kill Victim

To assist in proving intent to kill, the state introduced testimony concerning a prior incident in which the defendant participated in a conspiracy to kill the victim. Detective John Scallan of the St. Tammany Parish Sheriff's Office testified that on June 30, 1998, Charles "Tinker" Schmolke, a confidential informant, contacted him. Schmolke disclosed that an individual, named Gerald Branigan, had approached Schmolke and requested his assistance in killing someone.

Appendix A

Branigan told Schmolke that the defendant was willing to pay to have the victim, his ex-wife, killed. To test the accuracy of this information, Scallan asked Schmolke to meet with the co-conspirators while wearing an electronic transmitting and recording device. Schmolke agreed to cooperate with the investigation.

According to Scallan, there were three meetings during which Tinker feigned the role of a co-conspirator. Scallan monitored the conversations of each meeting by listening to the audio transmissions over the electronic device worn by Tinker. Scallan also attempted to record the conversations at each of the meetings. However, due to a malfunction in the recording device, Scallan successfully recorded the conversations of only the first meeting.

The first meeting took place on the afternoon of June 30, 1998, at the residence Branigan shared with his girlfriend, Melanie Johnson. During this meeting, Schmolke, equipped with the Kell monitoring device, conversed with Branigan regarding the details of the conspiracy. Scallan testified that Schmolke's conversation with Branigan corroborated the conspiracy information initially relayed by Schmolke. The conversation was successfully recorded with an audio recording device stored inside Scallan's vehicle.

During Scallan's testimony, the audio recording of the conversation between Branigan and Schmolke was played for the jury. At the beginning of the conversation, Schmolke stated that he wanted to receive an advance payment for his participation in the planned homicide. Branigan informed Schmolke that when Branigan asked the defendant for $2,500

in advance, and another $2,500 after the homicide, the ex-husband (defendant) said "go." When Schmolke asked how the homicide would be accomplished, Branigan replied that they were going to "O.D." the intended victim, who was a heroin addict living in St. Louis, Missouri. Branigan further stated that the ex-husband was to give him some pictures and additional information on the intended victim's location and where she "hung" out. Schmolke indicated he did not want to participate in the job blindfolded and wanted to do the job right. Branigan reiterated that the intended victim was the ex-wife of the individual who sought their services. The intended victim was alone, as her daughter, who was about twenty years old, had moved back to New Orleans and could not be in their way. Schmolke told Branigan they could do business if Branigan would split the $2,500 advance payment with him. Branigan agreed, and said he would talk to the ex-husband and get the pictures later that night. Schmolke responded that he wanted to see some of the pictures if Branigan was able to get them. When Schmolke asked Branigan what the intended victim's name was, he answered that he did not know her first name, but that the last name was Tsolainos. Additionally, Branigan indicated that he and Schmolke would ride to St. Louis on a bus, kill the ex-wife by giving her a drug overdose, and then return to Louisiana. At the conclusion of the conversation, Schmolke affirmed his agreement to participate in the killing.[3]

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3. The jury was provided copies of a revised transcript of the conversation. The original transcript erroneously listed Detective Bobby Juge as the officer who monitored the conversation. In connection with the defense theory that the police botched the criminal investigation in this case, the original transcript was also introduced into evidence and presented to the jury at trial.

Det. Scallan further testified that on July 1, 1998, Schmolke had two additional meetings with Branigan. Despite the officer's attempts, these conversations were not successfully recorded due to a malfunction in the recording device. Although Det. Scallan had monitored both meetings as they took place, the trial court sustained the defendant's objection and refused to allow Det. Scallan to recount the contents of the conversations at trial.

The state also presented testimony from Detective Bobby Juge of the St. Tammany Parish Sheriff's Office. Det. Juge testified that he was assigned to the investigation of the alleged conspiracy on July 6, 1998. After speaking with Branigan and his girlfriend, Melanie Johnson, Det. Juge arrested Branigan and charged him with conspiracy to commit murder. Thereafter, on July 7, 1998, Det. Juge obtained warrants for the arrest of the defendant and his adopted daughter, Melissa Tsolainos.[4] Subsequently, the defendant and Melissa were arrested and transported to the St. Tammany Parish jail in Covington, where they both gave statements to Det. Juge. During Det. Juge's testimony, the state introduced a copy of the defendant's statement into evidence. The taped statement was played for the jurors, who were also provided with copies of a transcript of the statement

In the taped statement, made approximately two weeks before the victim's death, the defendant admitted that two months earlier he had been introduced to Branigan, who was

4. Melissa Tsolainos was present during one of Schmolke's meetings with Branigan and was alleged to have had knowledge of the conspiracy plans. Melissa also was charged with conspiracy, but after a trial, she was acquitted.

referred to as "G" (Gerald Branigan), through his daughter, Melissa. Defendant stated that he knew Branigan was a hit man. The defendant asked Branigan if he knew what was involved in having someone killed. When Branigan asked why the defendant was seeking this information, the defendant told Branigan that he was having problems with his ex-wife because she was trying to gain custody of their children and half of their assets. Approximately six weeks later, Schmolke contacted Melissa Tsolainos and asked her to have the defendant contact him. Schmolke ostensibly was attempting to put the defendant in contact with Branigan, but the defendant claimed he had been avoiding Branigan to keep from giving him a definite answer about the murder. The defendant did not speak to Schmolke because he talked to Branigan first. Branigan told him that the hit would be done.

The defendant told Branigan that the intended victim was in St. Louis, but did not provide Branigan with her address or telephone number. The defendant and Branigan then negotiated a price. The defendant thought he agreed on $500.00, but later found out that he had misunderstood and the actual asking price was $5,000.00. They also discussed payment arrangements. Half of the arranged fee was to be paid before Branigan left for St. Louis, with the balance to be paid upon his return. The defendant and Branigan also arranged a method by which the defendant could inform Branigan if it was safe to return to St. Tammany Parish after the murder. The defendant claimed he was supposed to provide Branigan with the intended victim's address and a photograph of her, but he never actually did. The defendant stated that during his final conversation with Branigan,

Branigan asked the defendant if he still wanted to go forward with the planned murder. The defendant responded affirmatively, but instructed Branigan to wait until further notice.

Defendant also provided information on the extent of Melissa's involvement in the conspiracy plans. He indicated that Melissa knew what he was trying to arrange with Branigan:

Q. She knew that you planned on or you were in the process of getting a hit done?

A. Yes, and that's when I explained to her that Melissa, this is not a good idea, these boys want to do it either this way or that way, and one of the ways they want to do it is the overdose, and I don't know if Mom's actually doing that anymore. It would look funny, and I don't want to have anything to do with it anymore, and uh, I did . . . I think the whole idea was a bad idea, you know, and I didn't want them bothering her about it either.

Q. Did she know right at that point, when you told her it was going to be done by an overdose?

A. Well, that's when I discussed about, I tried to inform, I was informing her of what the plan was.

Appendix A

Detective Juge's Trial Testimony

Det. Juge further testified that on July 19, 1998, he became involved in the investigation of the murder of the victim. At approximately 8:15 p.m., Det. Juge was dispatched to the Morgan Bluff Road residence. Upon determining that there were eyewitnesses to the incident, Det. Juge spoke with Clarissa, Stephen Tsolainos, and George Deforrest. Det. Juge took taped statements from each of them at the residence. Later, at the St. Tammany Parish Sheriff's Office, Det. Juge advised the defendant of his **Miranda** rights, obtained a waiver of those rights, and asked the defendant what happened. The defendant replied, "I just killed my old lady. What else you want me to say?" Thereafter, the defendant made a taped statement to Det. Juge.

In his taped statement, the defendant told the detective that, on July 19, 1998, he and Connie Deville left Marrero and traveled to Waveland, Mississippi, to look at real estate. According to the defendant, the couple planned to get married and settle there. While in Waveland, Connie called her home and learned that Bobby Brown, the maternal uncle of the defendant's children, had called her home looking for the defendant. In response, the defendant contacted Brown and learned that the victim, who had been granted use of the Morgan Bluff Road residence, had requested that Connie Deville come and retrieve the things she had stored in the garage of the residence. The defendant and Connie immediately proceeded to the Morgan Bluff Road residence to retrieve their belongings.

Appendix A

Upon arriving near the residence, the defendant exited the vehicle at a stop sign approximately 100 yards from the residence and Connie went onto the property. The defendant stayed behind due to the conditions of his bond on the conspiracy charge, which prohibited any contact with the victim or their minor children. From his position across the street, the defendant watched as the victim helped Connie load her belongings into the vehicle.

Sometime later, as Connie continued to load the vehicle, the victim brought Stephen and Stephanie Tsolainos, the victim and the defendant's minor children, out to the street and allowed them to visit with the defendant. The interaction between the defendant and the victim was civil, very amicable. Once Connie finished loading the vehicle, Connie picked up the defen !ant from the street and left the area.

Later that evening, after unloading the vehicle, the defendant and Connie returned to the residence. The defendant was driving the vehicle. The defendant entered the property and he began loading the vehicle while the victim and Connie stood aside talking. Finally, when the vehicle was filled, the defendant and Connie prepared to leave. As they said their goodbyes, Stephanie started to cry. She wanted to go with her father. As the defendant tried to console Stephanie, the victim said, "Yeah, you used to be a good father, that's why I did this, so you need to get your act together again." Annoyed by this comment, the defendant replied, "you're a fine one to talk, and uh, at least I didn't do heroin and I didn't take the kids to the projects and put them in harm[']s way everyday." According to the defendant, the victim became very angry. She started crying, yelling, and banging on the vehicle.

The defendant stated that he then entered the vehicle, started the engine, and shifted to reverse. He claimed that he started moving backwards, but stopped to let Connie get in. Meanwhile, the victim was still yelling and pounding on the vehicle's windshield. Connie kept indicating that the victim was going to break her mom's windshield and requesting that the defendant stop her. The vehicle's windshield wipers were engaged and were "going back and forth." The defendant depressed the accelerator, but the vehicle did not move. Somehow, the vehicle was now in neutral. The defendant then shifted the vehicle into what he thought was reverse and depressed the accelerator again. The vehicle went forward and hit the victim.

The defendant denied having any intent to hit the victim. He claimed he thought the vehicle was in reverse when he "gunned" the accelerator. Defendant stated his intentions were to rapidly reverse down the driveway and leave the premises. He knew that he should not have been at the residence and was attempting to flee. Defendant claimed he must have mistakenly shifted the vehicle into drive while attempting to disengage the windshield wipers. The defendant was unable to recall whether he ever applied the brakes during the incident.

The state introduced a copy of the defendant's taped statement and a transcript of its contents into evidence. Detective Juge testified that the defendant showed no remorse during the taped statement.

Appendix A

Defendant's Evidence

The defendant took the stand in his own defense. Defendant admitted striking the victim with the vehicle. However, he alleged that it was an accident. He claimed he inadvertently shifted the vehicle into drive while attempting to disengage the windshield wipers.

In support of the accident theory, the defendant presented evidence of the design of the Buick Skylark. Dr. Edward Carnes, an expert human factors ergonomist and human factors engineer, testified that the Buick Skylark involved in this case contained several design defects giving rise to increased potential for "control misapplication" or "operator error." The design defects noted by Carnes included the gearshift lever and windshield wiper lever of similar size and shape located in close proximity to one another on the same side of the steering column.

As further support of his control misapplication theory, the defendant also elicited the testimony of Betty Rodriguez, the owner of the Buick Skylark.[5] Mrs. Rodriguez testified that although the defendant periodically used her vehicle to make short trips to the video store, the day of the instant incident was the first time he ever used the vehicle for any extended period of time. She further testified that she often experienced problems differentiating between the gearshift and the windshield wiper lever.

The defendant also presented the testimony of Connie Deville. Deville testified that on the date in question, each

5. The record established that Betty Rodriguez is the mother of the defendant's girlfriend, Connie Deville.

time the defendant attempted to shift the vehicle, the windshield wipers would engage.

Regarding the encounter at the Morgan Bluff Road residence, Deville testified that when she and the defendant prepared to leave, Stephanie began to cry because she wanted to go with the defendant. According to Deville, the defendant then turned to the victim and stated that perhaps the reason the child did not want to be with the victim was because of "what [the victim] did to her while she was pregnant." This remark, Deville stated, upset the victim, and a verbal confrontation between the victim and the defendant ensued.

During the argument, the victim called for Clarissa to come and get Stephanie. Deville testified that Clarissa came outside, got Stephanie, and returned to the house. Thus, Clarissa was not outside when the defendant struck the victim with the vehicle.

Deville stated that she was standing near the vehicle, inside the opened passenger door, when the defendant started the ignition. The defendant revved the engine and the vehicle jerked backwards, knocking Deville to the ground. Meanwhile, the victim and the defendant were still "hollering back and forth." As Deville attempted to get up from the ground, she witnessed the vehicle strike the victim. Deville testified that neither Clarissa nor Stephanie was hit by the vehicle, as they were not outside.

Deville claimed the defendant appeared to be "in shock" immediately after the incident. On cross-examination, Deville testified that the defendant told her, "[t]hey are going to blame me for it and it was an accident."

Appendix A

In support of his insanity defense, the defendant elicited expert testimony from Dr. John Wilson, a psychologist specializing in "stress and the effects of stress on individuals." Dr. Wilson conducted a one-on-one interview with the defendant, administered psychological tests, and reviewed numerous collateral documents regarding the circumstances surrounding the incident. Dr. Wilson concluded that the psychosocial stresses of the situation: including the victim's rageful state, the victim's history of drug abuse and unpredictably violent behavior, the defendant's knowledge of the existing restraining order, and the unexpected forward movement of the vehicle, all triggered a "hypervigilant" or fear response, which directly impacted the defendant's behavior during the incident in question. Based largely on his clinical evaluation of the defendant, Dr. Wilson opined the psychosocial stresses caused emotional escalation of "fear, panic, confusion, disorientation, [and] increased arousal" in the defendant, which in turn affected the defendant's ability to cope with the situation and to properly operate the vehicle. On cross-examination, however, Dr. Wilson admitted that the defendant's emotional reaction was also due, at least in part, to "anger."

After a careful review of the record, we are convinced that a rational trier of fact, viewing all of the evidence in a light most favorable to the prosecution, could have concluded that the state proved beyond a reasonable doubt that the defendant was guilty of second degree murder. Although the defendant has asserted repeatedly from the time of the victim's death that the incident was accidental, his claim is inconsistent with the testimony presented by eyewitnesses.

The guilty verdict in this case indicates that the jury accepted the testimony of the state's witnesses, and that the evidence was sufficient to show the defendant intended to kill the victim. The jury obviously rejected the defendant's claim that he accidentally ran over the victim when he misapplied the vehicle's controls. As the trier of fact, the jury is free to accept or reject, in whole or in part, the testimony of any witness. **State v. Johnson**, 99-2114, p. 14 (La. App. 15th Cir. 12/18/00), 800 So.2d 886, 894, *writ denied*, 2001-0197 (La. 12/7/01), 802 So.2d 641. We find no error in the jury's decision to accept the testimony of the state's witnesses in this case.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO
FAIR TRIAL

In this assignment of error, the defendant contends that he did not receive a fair and impartial trial. In support of his contention, the defendant alleges the following trial court errors: (1) the trial court's denial of his motion for change of venue based upon pretrial publicity; (2) the trial court's failure to permit appropriate detailed individual questioning of jurors; (3) the trial court's denial of the defendant's cause challenges against certain jurors based upon pretrial publicity; and (4) juror Mark Berryhill's failure to admit his relationship with a witness and to disclose the acrimonious nature of his divorce.

Appendix A

Change of Venue

On September 29, 1998, the defendant moved for a change of venue, arguing that extensive and inflammatory media coverage and pretrial publicity in this case caused preconceived public prejudice against the defendant and made it impossible for him to receive a fair trial in St. Tammany, Tangipahoa, or Washington Parishes. He argued that the extent of the preconceived public prejudice against him necessitated a change of venue. On August 31, 1999, prior to holding a hearing, the court denied the defendant's motion for change of venue as premature, specifically reserving defendant's right to re-urge the motion after the completion of voir dire.[6]

Subsequently, on October 12, 1999, prior to commencement of voir dire, the trial court held a hearing on the defendant's motion for change of venue. In support of his contention that the quantum and inflammatory nature of the pretrial publicity attendant to the case made it impossible for him to receive a fair trial, the defendant introduced results from a public opinion poll, several videotapes of news broadcasts, logs of when the reports were televised, and copies of the numerous newspaper articles reporting on the incident.

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6. Defendant filed a supervisory writ application with this court seeking review of the trial court's ruling on the motion for change of venue. In an unpublished decision, this court denied the writ application. **State v. Tsolainos**, 99-2401 (La. App. 1st Cir. 10/8/99). Defendant then sought supervisory review with the supreme court, which also was denied. **State v. Tsolainos**, 99-2885 (La. 10/11/99), 748 So.2d 457.

Appendix A

In addition, the defendant introduced newspaper articles and news broadcasts reporting on the public bribery case of 22nd Judicial District Court Judge Patricia Hedges. Judge Hedges was the trial judge responsible for reducing the defendant's bond on the conspiracy charges. She was later indicted for extortion, bribery, and malfeasance in office.[7] Judge Hedges was alleged to have committed malfeasance in office in connection with her reduction of the defendant's bond.

At the hearing, the defendant also presented the testimony of Buster McKenzie, president of Southern Media and Opinion Research, Inc., who was qualified and accepted as an expert in public opinion sampling, with particular expertise in the performance of public opinion polling. Defendant also presented the testimony of Dr. Hunter Downing-Alessi[8], the head of the Department of Counseling, Family Studies in Educational Leadership program at Southeastern Louisiana University. Dr. Downing-Alessi was qualified and accepted as an expert in the field of licensed professional counseling.

McKenzie testified that in connection with the instant case, Southern Media and Opinion Research, Inc. conducted a formal public opinion survey of registered voters in

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7. The defendant was arrested on July 7, 1998 for conspiring to have the victim killed. Bond was set at $800,000. On July 17, 1998, Judge Hedges reduced the defendant's bond to $450,000, and he was released. Two days later, the instant offense occurred.

8. Throughout the record, Dr. Downing-Alessi's name is erroneously cited as "Downey-Alessi."

Appendix A

St. Tammany, Tangipahoa, and Washington Parishes to determine (1) the extent of media readership and viewership in the tri-parish area, (2) the awareness of media concerning the defendant, and (3) what opinions people might hold with respect to the defendant. In connection with the polling, investigators interviewed approximately 1200 registered voters (400 from each parish) from the study area. The defense introduced the collective survey results from the tri-parish study area, as well as the results from each individual parish.

Results of the St. Tammany Parish poll indicated that of the 400 individuals interviewed, more than 80% were familiar with the facts of the case. However, of the individuals who were familiar with the case, over 60% indicated that they had not formed an opinion about the case.

Dr. Downing-Alessi testified regarding the subtle or subconscious effect that any publicity might have on a prospective juror. In connection with her testimony, Dr. Downing-Alessi reviewed literature and research that indicated that the usual pretrial publicity can prejudice potential jurors. She opined that the usual remedies; such as extended voir dire, judicial admonitions, and deliberations by the jury, are not effective at reducing the publicity-induced prejudice. She believed that potential jurors tend to overestimate their ability to be fair and impartial when faced with emotionally-laden material. After evaluating the results of the public opinion survey and reviewing the evidence of pretrial publicity introduced by the defendant, Dr. Downing-Alessi concluded that a change of venue would be the most effective remedy to combat the effects of pretrial publicity in this case.

At the conclusion of the hearing, the trial court deferred ruling on the motion until after voir dire. The court held that voir dire was necessary to determine if actual prejudice against the defendant existed on the part of the prospective jurors.

According to the information gathered during voir dire, approximately forty-eight prospective jurors were questioned. Of those questioned, the majority, about 85%, had been exposed to some publicity surrounding this case. Of the jurors who were familiar with the case, 10 were dismissed for cause for having formed an opinion about the case based on pretrial publicity.[9] The remaining jurors with any knowledge of the case, all denied that any published accounts of the case would affect their ability to apply the law in a fair and impartial manner. In denying the other challenges for cause based on pre-trial publicity, the trial court reviewed each case and articulated its reasons for finding that the particular juror could be impartial. None of the jurors had taken part in the poll.

Although a defendant is not entitled to a jury that is totally ignorant of the case to be heard, the Louisiana Constitution grants the accused the right to trial by an impartial jury. **State v. Bennett**, 527 So.2d 1126, 1127 (La. App. 1st Cir. 1988). *See* La. Const. art. I, § 16. "A change of venue shall be granted when [a defendant] proves that by reason of prejudice existing in the public mind . . . , or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending."

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9. Two additional prospective jurors were dismissed for cause for other reasons.

Appendix A

La. Code Crim. P. art. 622. In deciding whether to grant a defendant's motion for change of venue, the trial court must decide if prejudice or influence will affect either the answers of the jurors on the voir dire examination or the testimony of the witnesses at trial. **State v. Clark**, 442 So.2d 1129, 1132 (La. 1983).

Factors to consider in determining whether a change of venue is appropriate include:

> (1) the nature of pretrial publicity and the particular degree to which it has circulated in the community, (2) the connection of governmental officials with the release of the publicity, (3) the length of time between the dissemination of the publicity and the trial, (4) the severity and notoriety of the offense, (5) the area from which the jury is to be drawn, (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant, and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire."

State v. Bell, 315 So.2d 307, 311 (La. 1975).

"In urging a change of venue for his trial, an accused must establish that there exists such prejudice in the collective mind of the community that a fair trial is impossible." **State v. Wilson**, 467 So.2d 503, 512 (La.), *cert. denied.* 474 U.S. 911, 106 S.Ct. 281, 88 L.Ed.2d 246 (1985). "The defendant must show more than mere public knowledge of facts

surrounding the offense to be entitled to have his trial moved to another parish." *Id.* "In unusual circumstances, prejudice against the accused sufficient to mandate a change of venue may be presumed." **State v. Moseley**, 587 So.2d 46, 52 (La. App. 2d Cir.), *writ denied*, 589 So.2d 1066 (La. 1991); *see* **Dobbert v. Florida**, 432 U.S. 282, 302-303, 97 S.Ct. 2290, 2302-03, 53 L.Ed.2d 344 (1977); **State v. Clark**, 442 So.2d at 1134. "This presumption of prejudice will only attach when the trial atmosphere is entirely corrupted by press coverage or when it is entirely lacking in the solemnity and sobriety to which a defendant is entitled in a judicial system of fairness." **State v. Mosley**, 587 So.2d at 52. If prejudice is not presumed, the defendant must establish the existence of actual prejudice on the part of prospective jurors. *See* **State v. Goodson**, 412 So.2d 1077, 1080 (La. 1982).

Whether a defendant has made the required showing of more than mere knowledge is a question addressed to the trial court's sound discretion, which will not be disturbed on appeal absent ant affirmative showing of error and abuse of that discretion. **State v. Wilson**, 467 So.2d at 512. Although the trial court possesses a broad range of discretion in this area, the reviewing court is also required to make an independent evaluation of the facts to determine whether the accused received a fair trial unfettered by outside influences. **State v. Daniels**, 628 So.2d 63, 70 (La. App. 1st Cir. 1993), *writ denied*, 94-3044 (La. 11/15/96), 682 So.2d 752.

We have thoroughly reviewed all of the evidence submitted by the defendant in support of the venue motion. The record reveals that the defendant failed to prove that a change of venue was necessary in this case. While the

defendant successfully showed that there was extensive media coverage and general knowledge within the community about the basic facts of the case, he failed to present sufficient evidence of an overriding prejudice within the community's collective mind that prevented him from receiving a fair trial.[10] Although many of the prospective jurors responded that they were aware of the case, and some even indicated that the publicity they recalled was negative, each individual juror assured the court that he or she would be able to set aside that information and decide the case based upon the law and the evidence presented at trial. Prospective jurors who indicated that they had formed an opinion that could not be set aside were excused for cause. Accordingly, we find no abuse of discretion by the trial court in denying the defendant's motion for change of venue. This argument is without merit.

Individual Questioning of Jurors

Next, the defendant contends that the voir dire of prospective jurors in this case was defective. Defendant cites the trial court's curtailment of his questioning on whether the presence of children during this incident would affect the juror's opinion.

During the voir dire examination of prospective juror Woodward, counsel for the defendant asked if the involvement of children in any aspect of the case would affect Mr. Woodward. In response to an objection by the state, the

10. The news articles and broadcasts concerning the case, although admittedly numerous, were primarily factual in nature and tracked the progress of the case.

trial court instructed defense counsel to rephrase the overly broad question. Counsel for the defendant then specifically asked if Mr. Woodward would be affected if he learned that children were involved in this incident. The state again objected. The trial judge sustained the objection, holding that the question goes into facts that may come out in the case. The defendant did not object to the restriction.

Because the defendant failed to object to the trial court's restrictions on voir dire, the issue was not preserved for review. *See* La. Code Crim. P. art. 841; **State v. Edwards**, 94-1985, p. 3 (La. App. 4th Cir. 8/23/95), 660 So.2d 907, 908, *writ denied*, 96-2383 (La. 2/20/98), 709 So.2d 766, *cert. denied*, 525 U.S. 856, 119 S.Ct. 137, 142 L.Ed.2d 111 (1998). Moreover, our review of the transcript of the entire voir dire examination shows that the trial judge afforded defense counsel wide latitude when he examined prospective jurors as to prejudices, predispositions, or misunderstandings relevant to the central issues of the case.

Cause Challenges

The defendant contends that the trial court erred in denying his challenges for cause as to twelve prospective jurors: Ellen Reagin, Carlos Urbina, David Lynch, Kimberly Normand, Jerry Gill, Jon Woodward, Charles Borden, Walton Organ, Mildred Allen, Pamela Rossi, Irene Pratt and Carl Dugas. He argues that the trial court should have granted these cause challenges for the prospective jurors who had been exposed to inadmissible inflammatory information regardless of their professed state of mind. He asserts that the denial of his challenges for cause forced him to expend

eight of his peremptory challenges during the jury selection process.[11] The defendant eventually exhausted all of his peremptory challenges.

A trial court is vested with broad discretion in ruling on challenges for cause, and its ruling will not be reversed unless a review of the entire voir dire reveals the court abused its discretion. **State v. Jacobs**, 99-1659, p. 5 (La. 6/29/01), 789 So.2d 1280, 1284. "Prejudice to the defendant by a trial [court's] rulings is presumed when a challenge for cause is denied erroneously by a trial court and the defendant ultimately exhausts his peremptory challenges." **State v. Williams**, 01-1650, p. 10 (La. 11/01/02), 831 So.2d 835, 845. If a potential juror has formed an opinion of the defendant's guilt based on pretrial publicity, the trial court should grant the defendant's challenge for cause unless the "juror declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence." **State v. Frank**, 99-0553, pp. 19-20 (La. 1/17/01), 803 So.2d 1, 18, *quoting* **State v. Smith**, 491 So.2d 641, 646 (La. 1986); La. Code Crim. P. art. 797(2).

A trial court's refusal to excuse a prospective juror for cause is not an abuse of discretion where, "after further inquiry or instruction, the potential juror has demonstrated a willingness and ability to decide the case impartially according to the law and the evidence." **State v. Jacobs**,

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11. While prospective juror Mildred Allen was included in this assignment of error, the record reflects that Ms. Allen was not challenged for cause based upon exposure to pretrial publicity. Ms. Allen was dismissed from jury service as a result of a peremptory challenge by the state.

99-1659 at p. 5, 789 So.2d at 1284. "If a juror who has acquired knowledge about the case through the media can sufficiently lay aside his or her impression of the defendant's guilt or innocence and render a verdict based on the evidence presented, he or she is competent to serve as a juror." **State v. Frank**, 99-0553 at p. 19, 803 So.2d at 18.

We have reviewed carefully the voir dire examination responses of each of the named jurors. We note that, while several of the challenged jurors admitted exposure to some type of pretrial media coverage, they demonstrated only a cursory familiarity with the facts surrounding the incident and denied that published accounts of the case would affect their ability to remain fair and impartial and to apply the law as directed by the trial judge. Furthermore, although the defendant claims that each of the following jurors was challenged for cause based upon exposure to pretrial publicity, the record before us reveals that such is not the case.

Prospective juror Reagin was challenged for cause because she had been a victim of domestic violence. During questioning, Reagin stated that she had been a victim of domestic violence and arguably indicated that she may have sympathy towards the victim. Later in questioning, Reagin stated that she understood that the state has the burden of proving the defendant's guilt. She assured the court that she would put aside any personal feelings and decide the case based upon the evidence presented at trial. In denying defendant's challenge for cause, the court stated that Reagin had been successfully rehabilitated. The court noted that Reagin's voir dire responses indicated that she could be fair

and impartial. We find no abuse of discretion in the trial court's ruling as to prospective juror Reagin.

Prospective juror Urbina was challenged for cause on the ground that his wife was employed by the St. Tammany Parish Sheriff's Office. During general voir dire examination, prospective juror Urbina indicated that his wife worked in the St. Tammany Parish Sheriff's Office. Later, during individual questioning, Urbina stated that he learned of this case from his wife. Urbina indicated that his wife did not provide many details. She only told him that "something big happened by Pearl River, about where a husband had killed a wife or something. That's about it." He denied hearing anything from his wife regarding Judge Hedges or anyone being in jail prior to the instant incident. When questioned as to whether he had formed an opinion of the case based upon the information received from his wife, Urbina responded negatively. He further indicated that the information he received from his wife would not affect his ability to remain fair and impartial. The trial court denied the challenge for cause, noting that Urbina's wife was new on the job and worked in the accounting department. We find no abuse of discretion in the trial court's ruling. Urbina's voir dire responses do not indicate an inability to decide the case impartially according to the law and the evidence presented at trial.

As to prospective juror Lynch, the defendant urged a challenge for cause based upon Lynch's extensive knowledge of the facts of the case. In support of the challenge, the defendant pointed to Lynch's voir dire response wherein he indicated that he read approximately ten newspaper articles

on this case and even recalled that one of the co-conspirators was from River Gardens. The defendant argued that the prospective juror's intimate knowledge of the case raised a serious question as to his ability to be impartial.

Despite his knowledge of the case and the bond reduction incident, Mr. Lynch indicated he had not formed an opinion as to the defendant's guilt or innocence. He acknowledged that articles appearing in the newspaper are not always an accurate depiction of the facts. Lynch unequivocally indicated that he could ignore anything he had read in the paper, and would decide the case based upon the facts presented at trial. He assured the court that none of the information previously gleaned from the printed media would affect his ability to decide the case in a fair and impartial manner based upon the evidence presented at trial. In denying the defendant's challenge for cause, the trial court noted that based upon Mr. Lynch's voir dire responses, the court was satisfied that the prospective juror could be fair and impartial. We find no abuse of discretion as to the court's ruling as to Mr. Lynch.

The defendant challenged prospective juror Normand for cause based upon voir dire responses, which he contends suggested that she would have a problem affording the defendant the presumption of innocence. He argued that there were lengthy pauses in Ms. Normand's responses when she was questioned concerning whether she would require the defendant to present a defense. In response to the cause challenge, the trial judge, who was present during the voir dire examination, commented on Ms. Normand's responses stating, "[t]he Court did review her demeanor. The Court did observe that her answers were deliberate, but the Court

listened very carefully and she said that she could be fair and that the Court feels and so noted that she would be an appropriate potential juror in this case."

Upon reviewing the entirety of Ms. Normand's voir dire responses, we find no abuse of discretion in the trial court's ruling. Ms. Normand recalled the case from the newspaper and television. She remembered that the ex-wife was killed and the defendant was driving the car. Ms. Normand remembered that there were children involved in the incident and that Judge Hedges had some connection with the case. However, Ms. Normand stated that she could decide the case on the facts presented at trial. She was confident in her ability to serve as a fair and impartial juror.

Prospective juror Gill was challenged for cause based on his exposure to television news coverage during the jury selection process. In response to voir dire examination, Mr. Gill admitted that he had been watching a television program the previous night, when he observed a brief news account indicating that the defendant's trial may be moved to a different venue. He indicated that lie was not specifically watching the news and denied hearing any other information on the case. In denying the challenge for cause, the trial court noted, "[t]he court listened very carefully to Mr. Gill's testimony and finds that he testified, unequivocally, that he could be fair and impartial, that he would listen to the law and evidence, and the Court does not find that his noting that there may be a change of venue has any significant bearing upon the ultimate issue to be cited (sic) if he is made

a juror in this case."[12] Again, we find no abuse of discretion in the trial court's ruling.

Prospective juror Woodward, also challenged for cause by the defendant, did not recall the case at all. He indicated that he did not watch television and rarely read the newspaper. Mr. Woodward had no knowledge of any of the facts surrounding the incident or any facts relating to Judge Hedges. Mr. Woodward did, however, admit that the fact that someone has been in jail before might raise a question as to his or her character. The defendant challenged Mr. Woodward for cause based upon the aforementioned response, which he believes indicates the juror's inability to be fair and impartial. In denying the challenge, the trial court noted that Mr. Woodward indicated that the fact that a person has been in jail "might" raise a question as to his or her character, but would not be definitive on the issue. The court also observed that the juror's "demeanor was one of straightforwardness." For these reasons, we find no abuse of discretion in the trial court's denial of the challenge for cause.

The defendant's challenge for cause as to prospective juror Borden centered around Borden's indication that he would have difficulty considering testimony by a psychologist as opposed to a psychiatrist. The trial court, in denying the cause challenge, indicated that Mr. Borden successfully rehabilitated himself on the psychologist versus

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12. The trial court stated that it had admonished the entire panel of prospective jurors to refrain from watching any news commentary or news programs and from reading any articles concerning the case. The court further noted for the record that Mr. Gill was late and missed the admonishment of the Court in that regard.

psychiatrist issue. The court further noted that Mr. Borden testified that he could not classify the incident as accidental or criminal based solely upon his recollection of news accounts or media coverage. In response to voir dire examination, Mr. Borden admitted that he vaguely recalled the facts of this case. He did not recall whether the incident was presented as an intentional act or as an accident. Mr. Borden stated he was unaware of any connection the defendant may have had with Judge Hedges. While Mr. Borden originally stated that he did not agree with many of the philosophies of psychologists, he ultimately indicated that if a psychologist testified in this case he would listen and scrutinize the testimony before drawing a conclusion. We find no error in the trial court's denial of defendant's challenge for cause as to prospective juror Borden.

Next, the defendant challenges the trial court's denial of his challenge for cause as to prospective juror Organ. The defendant sought to have Mr. Organ excused for cause based upon his indicating that he would have animosity toward the defendant's trial attorneys. During his voir dire examination, Mr. Organ admitted that he was familiar with the incident involved in this case. He also recalled that there were some charges pending against Judge Hedges for letting someone out of jail. However, he did not recall that the matter with Judge Hedges was in any way connected to the instant case. He stated that he understood that as a juror he would be required to rely solely on the evidence presented at trial when deciding the case and did not have a problem doing so. Mr. Organ further indicated that he would not have a problem affording the defendant the presumption of innocence. In response to a question regarding whether he had any

animosity towards defense counsel, Mr. Organ replied, "I would say, is there animosity in my gut? Yes, it would be a lie to say there's no animosity. To say, can I be fair enough and believe that this gentleman deserves to be treated fairly and not put in jail for his life if he doesn't deserve to be there, then intellectually I would like to think I could make a fair judgment." In denying the challenge for cause, the trial court noted, "[t]he Court also observed the demeanor of this potential juror. Recognized him to be articulate. Recognized him to be – possess a good grasp of the questions that had been put to him. And the Court finds that this juror certainly rehabilitated himself, answered very candidly to defense counsel's questions about the animosity issue. He, I recall very vividly, he said that he would not hold that against Mr. Tsolainos." Considering Mr. Organ's voir dire response as a whole, we find no error in the trial court's denial of the cause challenge.

The defendant challenged prospective juror Rossi for cause based upon her voir dire response indicating that she thought the defendant was in trouble and would expect him to present a defense. During voir dire, Ms. Rossi indicated that she vaguely recalled the facts of this case from the newspaper. She did not recall whether the news media characterized the incident as an accident or an intentional act. Ms. Rossi admitted that while she initially found the incident to be an "unusual coincidence" based upon the information indicating that there was some trouble in the family, she did not automatically conclude it was intentional. Ms. Rossi stated that although she thought the defendant was in a lot of trouble based upon the fact that the incident occurred, she was aware that a criminal defendant is not

required to present a defense. Ms. Rossi did not recall any information indicating that the defendant had been in trouble before the present charge. Ms. Rossi unequivocally indicated that she could set aside any personal feelings and rely solely on the evidence presented at trial. She further indicated that the information she read on this case did not, in any way, affect her ability to remain fair and impartial. On the issue of other crimes evidence, Ms. Rossi indicated that out of fairness to the defendant, she would require that the state prove that the offense alleged was actually committed by the defendant. Ms. Rossi further indicated that she would not have a problem following the law as instructed by the trial judge in deciding this case.

In denying the challenge for cause, the trial court noted that it observed Ms. Rossi's demeanor and her responses to the questions posed and was impressed with her answers. The court found that Ms. Rossi's voir dire responses indicated that she could be fair and impartial and that she was not unduly swayed by any pretrial publicity. After reviewing Ms. Rossi's voir dire responses and the findings of the trial court, we find that the trial court correctly denied the defendant's challenge for cause as to this potential juror.

The defendant challenged prospective juror Pratt for cause based upon her inability to be fair and impartial. Specifically, the defendant pointed to Ms. Pratt's voir dire response wherein she indicated that she believed that Judge Hedges did something wrong. The trial court noted that while Ms. Pratt did mention that she thought Judge Hedges did something wrong, she indicated that she would not hold this against the defendant. The court concluded that Ms. Pratt

indicated that she could put aside anything she may recall about Judge Hedges and follow the law as instructed by the court. After reviewing the record and considering Ms. Pratt's voir dire responses as a whole, we find no error in the trial court's determination that Ms. Pratt could be a fair and impartial juror. The trial court did not abuse its discretion in denying the challenge for cause as to Ms. Pratt.

Finally, the defendant challenged prospective juror Dugas for cause based upon his inability to be impartial. The defendant noted that although Mr. Dugas stated that he would do his best, he expressed some reservations about whether his best would be good enough. Defendant argued Mr. Dugas never unequivocally stated that he would be able to set aside prior feelings in deciding this case.

In denying the challenge for cause, the trial court stated that it "listened very carefully to Mr. Dugas's individual voir dire and was impressed with his thoughtfulness, his articulate answers, and also his understanding of media and how they often have a spin or slant or it's a one-sided presentation." After noting that the voir dire responses provided by Mr. Dugas were similar to the responses of a prospective juror in **State v. "Blaise,"**[13] the trial court denied the challenge for cause.

Our review of the record reveals that during voir dire examination, when asked what he recalled about the case, Mr. Dugas generally recalled that there was an initial incident,

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13. The case referred to by the trial court actually is **State v. Glaze**, 439 So.2d 605 (La. App. 1st Cir. 1983)

then a controversial situation regarding bail with Judge Hedges, and then this incident occurred shortly thereafter. Mr. Dugas recalled that there was substantial controversy surrounding Judge Hedges' actions. In fact, he indicated that he recalled more about Judge Hedges and the investigation than he did about the instant offense. As to whether he believed Judge Hedges did anything wrong, Mr. Dugas stated that he did not have sufficient details from which to draw a conclusion. While Mr. Dugas admitted that he was initially affected by the notably one-sided information provided by the news media, he later stated that in acting as a juror in a trial, he would put all of the outside information aside and listen to all of the facts presented. He further indicated that, "everything would have to be proved." When asked if he would expect the defendant to present a defense, Mr. Dugas stated that the law, as he understood it, provided that a criminal defendant is innocent until proven guilty at trial. When further questioned as to whether the defendant's failure to take the stand would leave questions in his mind, Mr. Dugas replied, "I don't think so."

After carefully examining the record and reviewing the entirety of Mr. Dugas's voir dire responses, we cannot say that the trial judge abused his discretion in concluding that Mr. Dugas could render a fair and impartial decision according to the law and evidence. Thus, the trial court did not abuse its discretion in denying the challenge for cause as to prospective juror Dugas.

Appendix A

Juror Mark Berryhill

The defendant's next argument concerns juror Mark Berryhill. The defendant contends that the jury venire was tainted by Mr. Berryhill's failure to disclose the fact that he was acquainted with Charles "Tinker" Schmolke, and that he had experienced an acrimonious divorce.

A motion for new trial based upon the supposition that injustice has been done the defendant requires a showing that actual injustice or prejudice occurred. La. Code Crim. P. art. 851. Specifically, on the issue of misstatements of jurors, "the defendant must show that he was prejudiced by the misstatement for a new trial to be warranted." **State v. Johnson**, 32,910, p. 5 (La. App. 2nd Cir. 01/26/00), 750 So.2d 398, 403-04, *writ denied*, 2000-0911 (La. 11/3/00), 773 So.2d 140. The trial court has broad discretion in determining the impartiality of jurors. The court's ruling will not be disturbed absent a showing of abuse of discretion. **State v. Winn**, 412 So.2d 1337, 1344 (La. 1982).

On February 25, 2000, the defendant filed a Motion for a New Trial and Post Verdict Judgment of Acquittal based upon newly discovered evidence and tile existence of a prejudicial error or defect in the proceedings. In support of the motion, the defendant alleged, among other things, that evidence discovered after the trial revealed that juror Mark Berryhill was acquainted with Tinker Schmolke, the confidential informant in the conspiracy case. The defendant contends that Mr. Berryhill was impliedly biased, and that the defendant was prejudiced by his presence on the jury and denied a fair trial. The defendant further alleged that

Mr. Berryhill's ability to be fair and impartial was further complicated by his failure to disclose problems in his divorce.

The record in this case reveals that during general voir dire, counsel for the state and for the defense read their prospective witness lists. Neither the state's nor the defense's list included Tinker Schmolke, who had died before the trial.

Thereafter, the trial court asked if any of the veniremen knew any of the named witnesses. Mr. Berryhill did not respond.

Subsequently, counsel for the defense presented the following question to the veniremen: "[h]ave any of you personally been involved in or had a close relative or close friend who has [sic] involved in a divorce that didn't go smoothly? Anybody?" When asked to elaborate on this inquiry, counsel stated, "[w]ell, a term that lawyers use is acrimonious between two parties, fighting with each other over the divorce, community property settlement, things of that nature. Anybody have that experience in their personal life or close friends?" Again, Mr. Berryhill did not respond.

At the hearing on the motion for a new trial, the defendant presented testimony from Ronald Frazier, a private investigator, who indicated that he interviewed the members of the jury after the trial. Frazier testified his interview of Mr. Berryhill revealed that Mr. Berryhill knew Tinker Schmolke and that Mr. Berryhill had been involved in an acrimonious divorce that included criminal charges against him and his ex-wife.[14]

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14. The evidence contained in the record revealed that Berryhill had two prior divorces, only one of which is the subject of this assignment of error.

After a hearing, the trial court denied the motion. The trial court stated:

> First, as to the fact the defendant discovered after trial that one of the jurors, Mr. Berryhill, was acquainted with Tinker Schmolke, the confidential informant in the case. The court notes that although the defendant complains that the State did not list Tinker on its list of witnesses which was read to the prospective jurors, the defendant knew well in advance of trial that the tape of Tinker's conversations with Gerald Branigan, a co-conspirator would be played for the jury.
>
> The State and the defendant knew that Tinker had died several months prior to trial, and because of that the tape would be essential to the State to establish a case of conspiracy. That issue was the subject of a Prieur hearing which was conducted approximately one month prior to trial, after which the court ruled that the tape would be admissible. Given that ruling, the credibility of Tinker would be an issue and the defendant did attack Tinker's credibility at trial based on other grounds. The defendant could have ascertained whether any potential jurors knew Tinker by simply asking the jurors themselves whether any of them knew or had heard of him. This would not have involved a voir dire of the potential jurors on Tinker or his relation to the case as asserted by the defendant, or getting into facts, for that matter, is another way of saying it.

Appendix A

The court always, when it conducts that aspect of the voir dire examination asks the parties to read their witnesses, witness list, may call list, and although that may have something to do with the facts it does not get into a voir dire examination of the essential facts of the case. And that I think would be an objectionable ground if in voir dire you start discussing with the juror, what is your opinion concerning defenses that may be raised with the facts that may be presented. That is clearly improper voir dire. But, to ask the mere question, do any of you know the late Tinker Schmolke, would have been appropriate and would not have been objectionable.

The defendant's failure to exercise reasonable diligence on this issue warrants the denial of defendant's motion on this ground. Notwithstanding that, however, the court does not find that Mr. Berryhill's knowledge of Tinker constitutes an error in the proceeding which was prejudicial to the defendant. Mr. Berryhill testified that he was only casually acquainted with Tinker, a fact which was verified by Tinker's live-in girlfriend, Sheryl Johnson, who testified that in four or five years prior to Tinker's death she never saw Mr. Berryhill with Tinker, and in fact, had never met or even seen Mr. Berryhill until the hearing today.

Regarding Mr. Berryhill's favored response to defense's questions regarding divorces which

> did not go smoothly, his answer or failure to answer during voir dire are not untrustworthy or deceptive based on the record and his testimony today. The question, as phrased by defense counsel asked the potential jurors for an opinion or judgment call on their part. Nothing presented today indicates that Mr. Berryhill did have a divorce which did not go smoothly or was acrimonious in any way.
>
> The court notes that it is not essential that a defendant know every single detail or fact about a potential juror's past in order to intelligently exercise peremptory challenges, and finds that the information provided today by Mr. Berryhill regarding his divorces was not relevant to the question posed by counsel during voir dire. This information does not constitute prejudicial error and would not have changed the verdict in any way.

Considering the reasons provided by the trial court and based on the entire record before us, we find no abuse of discretion in the trial court's denial of defendant's motion. We also find no evidence in this record that would indicate that defendant was denied his constitutional right to a fair and impartial jury. This assignment of error lacks merit.

Appendix A

ASSIGNMENTS OF ERROR NUMBERS THREE AND FOUR PRIEUR ERRORS

In these assignments of error, the defendant contends that the trial court erred in allowing the state to introduce evidence of other alleged crimes or bad acts. Specifically, the defendant complains of the trial court's ruling allowing the state to introduce evidence of his participation in a purported conspiracy to commit the first degree murder of the victim. The defendant's argument is essentially twofold. First, defendant contends that the introduction of the conspiracy evidence violated La. Code Evid. art. 404(B) and **State v. Prieur**, 277 So.2d 126 (La. 1973), which require that the state first show that the alleged other crime was actually committed. Defendant avers that the state failed to sufficiently prove that the crime of conspiracy occurred. Secondly, defendant argues that the state's evidence of a conspiracy, which he contends consisted of a single tape-recorded conversation between Branigan and Schmolke, was inadmissible hearsay.

For the following reasons, we find no error in the trial court's finding that the state proved a prima facie case of conspiracy. Nor do we find error in the court's allowing the recorded conversation between Branigan and Schmolke to be introduced into evidence and played before the jury. Thus, the trial court did not err or abuse its discretion in denying the defendant's motion for mistrial.

Appendix A

Other Crimes Evidence

Because the introduction of evidence of other crimes may unduly prejudice the jury and deny the accused the right to a fair trial, evidence of other crimes or wrongs is generally inadmissible. **State v. Schleve**, 99-3019, p. 13 (La. App. 1st Cir. 12/20/00), 775 So.2d 1187, 1197, *writs denied*, 01-0210, 01-115 (La. 12/14/01), 803 So.2d 983, 804 So.2d 647, *cert. denied*, 537 U.S. 854, 123 S.Ct. 211, 154 L.Ed.2d 88 (2002). This rule of exclusion stems from the "substantial risk of grave prejudice to a defendant" from the introduction of evidence regarding his or her unrelated criminal acts. **Prieur**, 277 So.2d at 128. However, when evidence of other crimes or bad acts tends to prove a material issue and has an independent relevance other than to show that the defendant is a bad person, it may be admitted by certain exceptions. La. Code Evid. Art. 404(B)(1) sets out the purposes for which evidence of other crimes or bad acts may be admitted:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part

of the act or transaction that is the subject of the present proceeding.

"Even when the other crimes evidence is offered for a purpose allowed under Article 404, the evidence is not admissible unless it tends to prove a material fact at issue or to rebut a defense. The probative value of the extraneous crimes evidence must outweigh its prejudicial effect." **State v. Jacobs**, 99-0991, p. 24 (La. 5/15/01), 803 So.2d 933, 951, *cert. denied*, 534 U.S. 1087, 122 S.Ct. 826, 151 L.Ed.2d 707 (2002); La. Code Evid. art. 403.

Prior to trial of this matter, the state filed the appropriate notice of intent to use other crimes evidence. The state sought to introduce the conspiracy evidence to demonstrate not only the defendant's intent to kill and his motive for killing his ex-wife, but also to rebut the defendant's allegations that this was an accidental killing.

Following a hearing, the trial court found that the conspiracy evidence was relevant and admissible. In written reasons, the court concluded that the evidence presented at the hearing was sufficient to prove that the defendant, Melissa Tsolainos, and Gerald Branigan were engaged in a conspiracy to murder the victim. The court further found that there was an overt act in furtherance of the conspiracy: specifically, Branigan's act of contacting Schmolke to solicit his participation in the murder. The court noted that at the time Branigan contacted him, Schmolke was not a state agent or confidential informant. Moreover, Branigan contacted Schmolke again after Schmolke went to the police. Although

Schmolke could not actually act in furtherance of the conspiracy, Branigan's actions were that of a conspirator.[15]

On appeal, the defendant contends that the conspiracy evidence was inadmissible because the state failed to prove any act in furtherance of the conspiracy. He argues that because Schmolke was not a conspirator, his acts cannot be attributed to the conspiracy. Thus, the discussions evince only the agreement phase of a conspiracy. Defendant argues that to conclude that the discussions between Branigan and Schmolke were acts in furtherance of a conspiracy, would eviscerate the requirement of La. R.S. 14:26, which requires the state to prove both an agreement, or combination of two or more persons, and an act in furtherance.

La. R.S. 14:26(A) provides in pertinent part as follows:

> Criminal conspiracy is the agreement or combination of two or more persons for the specific purpose of committing any crime; provided that an agreement or combination to commit a crime shall not amount to a criminal conspiracy unless, in addition to such agreement or combination, one or more of such parties does an act in furtherance of the object of the agreement or combination.

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15. The defendant sought supervisory review of the trial court's ruling on the admissibility of the other crimes evidence with this court. In an unpublished decision, this court denied the writ application. **State v. Tsolainos**, 99-2401 (La. App. 1st Cir. 10/08/99). Defendant then filed a supervisory writ application with the supreme court, which also was denied. **State v. Tsolainos**, 99-2885 (La. 10/11/99), 748 So.2d 457.

Appendix A

In **State v. Richards**, 426 So.2d 1314 (La. 1982), the Louisiana Supreme Court discussed the overt act requirement of a conspiracy in connection with a first degree "murder for hire" charge. The defendant claimed the evidence was insufficient to establish an overt act and, thus, there was insufficient evidence of guilt.

Defendant Richard[16] was identified as the hit man. The conspirators included Joseph France, the client; Jim McGuire, a friend who gave France the name of the hit man; and Richard. Immediately after giving Richard's name to France, McGuire contacted federal agents and worked out a deal involving some pending charges. McGuire wore a wire transmitter through several meetings. During the meetings, Richard agreed to commit the murder, informed the others how he would dispose of the weapon, agreed on a fee of $6000.00, and worked out an arrangement by which McGuire would know the deed had been done. Richard told the others he wanted to perform the hit within a week and asked McGuire for a down payment of $1500.00. McGuire later gave him an envelope with money supplied by the police. McGuire was also supposed to give Richard the name and address of the victim, but instead told Richard he would call and furnish the information later. When McGuire left the meeting, Richard was arrested for the conspiracy to commit first degree murder. **Richards**, 426 So.2d at 1315-16.

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16. The case is captioned "**State v. Richards.**" We note, however, that the text of the case refers to the defendant as "Richard." For the purpose of this opinion we will use "Richard" to refer to the defendant and "Richards" when referring to the case.

Appendix A

In discussing the overt act requirement, the court noted it could be any act accompanying or following the agreement done in furtherance of the object of the agreement. The court further noted that the initial agreement to commit the murder was consummated at the first meeting between McGuire and Richard. The second meeting, used to transmit the victim's name and the down payment, was in furtherance of the conspiracy. The court quoted with approval language from **State v. D'Ingianni**, 217 La. 945, 47 So.2d 731, 733 (1950), as follows:

> Any act, *such as a visit by one of the parties to his coconspirator for the purpose of discussing details*, might suffice as an overt act to complete a criminal conspiracy although such an act would be regarded as merely preparatory in a prosecution for an attempt. [Emphasis added by court in Richards]

The court then concluded that the evidence was sufficient. **Richards**, 426 So.2d at 1317.

D'Ingianni involved a charge of conspiracy to defraud an insurance company by the defendant's filing a false claim on jewelry supposedly taken during a faked robbery. **D'Ingianni**, 47 So.2d at 731-32. The information alleged that two of the conspirators rode in a car with the third (the insured) from Canal Street to a location outside of New Orleans and "thereafter left the said D'Ingianni on the pretense of having taken the said D'Ingianni by force and violence in said automobile and by force and violence robbed

said D'Ingianni of the aforesaid items of jewelry. . ." **D'Ingianni**, 47 So.2d at 732.

The defendant claimed the bill failed to properly charge conspiracy because it did not allege the conspirators committed an act in furtherance of the conspiracy. Noting the bill of information alleged the men had ridden in the car together, the court then concluded as follows:

> The complaint of counsel for appellant is founded upon the fallacious theory that some step would have had to be taken by one or more of the conspirators with respect to the insurance company in order to have set the conspiracy in motion. In arguing thus, counsel confuse the overt act in the crime of conspiracy with that required for an unlawful attempt to commit an offense as denounced by Article 27 of the Criminal Code. In conspiracy, it is the combination of minds in an unlawful purpose which is the foundation of the offense. [Citations omitted.] The reason why an overt act is required in order for a conspiracy to be punishable "is to afford a locus poenitentiae, when either or all the conspirators may abandon the unlawful purpose." [Citations omitted.] As above stated, the overt act may be any act in furtherance of the agreement; a fortiori, it is not necessary that it constitute the crime and the question whether it serves to support the object of the conspiracy is one of fact for the jury. On the other hand, it is necessary, in prosecutions for attempt, for the State to prove an overt act

> tending directly toward the accomplishment by the accused of his object to commit the offense intended; mere preparation is not enough. Article 27, Cr. Code. Any act, such as a visit by one of the parties to his co-conspirator for the purpose of discussing details, might suffice as an overt act to complete a criminal conspiracy although such an act would be regarded as merely preparatory in a prosecution for an attempt.

D'Ingianni, 47 So.2d at 733.

Herein, the defendant essentially argues that the conspirators had to "do" something in furtherance of the conspiracy to kill Deborah Tsolainos. However, the conspirators did not need to perform some action that would constitute or would be part of an actual attempt to commit the crime. Under **D'Ingianni** and **Richards**, once the defendant asked Branigan to kill the victim and Branigan agreed, the additional acts of agreeing on a price, working out a method by which defendant could let Branigan know if it were safe for him to return to St. Tammany Parish, agreeing to furnish a photograph of Deborah Tsolainos to Branigan, and Branigan's contacting Schmolke, were acts taken in furtherance of the conspiracy. All of those actions are found in defendant's own statement. Although no down payment was made and defendant's statement actually indicated there may have been a misunderstanding as to the actual price, a price for the act was clearly discussed. While defendant claimed he was trying to avoid Branigan, the defendant admittedly discussed the act with Branigan more than once, but never withdrew from the conspiracy.

Thus, the trial court's conclusion that a basis under **Prieur** was established was correct. This argument lacks merit.

Hearsay

To admit the otherwise inadmissible out-of-court statements, La. Code Evid. art. 801(D)(3)(b) required the state to make a prima facie showing of the existence of the conspiracy. Defendant contends that the state failed in its burden. He avers that because Schmolke was never part of the alleged conspiracy, the recorded conversation between him and Branigan was inadmissible hearsay.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." La. Code Evid. art. 801(C). If such a statement is offered for any other purpose, such as proof only that the statement was made, then the statement is not hearsay. **State v. Thomas**, 589 So.2d 555, 568 (La. App. 1st Cir. 1991); **State v. Byrd**, 540 So.2d 1110, 1113 (La. App. 1st Cir.), *writ denied*, 546 So.2d 169 (La. 1989).

La. Code Evid. art. 801 provides in pertinent part as follows:

> D. Statements which are not hearsay. A statement is not hearsay if:
>
> (3) Relational and privity admissions. The statement is offered against a party, and the statement is:
>
> * * * *

> (b) A statement by a declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of the conspiracy, provided that a prima facie case of conspiracy is established. . . .

La. Code Evid. art. 801(D)(3)(b).

"A prima facie case of conspiracy is presented when the state introduces evidence which, if unrebutted, would be sufficient to establish the facts of the conspiracy." **State v. Lobato**, 603 So.2d 739, 746 (La. 1992). Hearsay evidence can be used to determine the prima facie case. *See* **State v. Myers**, 545 So.2d 981 (La. 1989); La. Code Evid. art. 104(A). A trial court's determination as to whether the state has made a prima facie showing of a conspiracy will not be overturned absent clear error. *See* **Lobato**, 603 So.2d at 746-47.

In **Lobato**, the Louisiana Supreme Court considered a claim that tapes recorded with the assistance of a confidential informant were admissible. The Court concluded that the tapes were admissible as non-hearsay. The false statements contained within the tapes were not made in furtherance of the conspiracy and were presented to the jurors as false statements intended to induce the co-conspirators to act. The true statements by defendant were admissible as admissions against his own interest. The true statements by the other conspirators were found admissible as statements in furtherance of the conspiracy. **Lobato**, 603 So.2d 745-46.

Appendix A

In the instant case, to prove the requisite prima facie case of conspiracy, the state introduced the testimony of Detectives Robert Juge and John Scallan, both of whom had extensive and intimate knowledge of the conspiracy investigation that led to the defendant's arrest. The state also offered the transcript and audio recording of the June 30, 1998 meeting between co-conspirator Branigan and the confidential informant Schmolke. During the meeting, Branigan solicited Schmolke's participation and explained the murder plans agreed on by the defendant and himself. The state also introduced the taped statement the defendant provided to police upon his arrest on the conspiracy charge. In the statement, the defendant admitted that he and Branigan had several conversations during which they established a price and method for the murder, and devised a plan to protect the perpetrators from returning to St. Tammany Parish if the plan to make the death appear accidental went awry. As previously noted, the standard for a prima facie case is the establishment of facts which, if unrebutted, would establish the facts of the conspiracy. In this case, defendant's statement alone supports the existence of the conspiracy. The recorded conversation between Branigan and Schmolke, which further indicates the defendant's knowledge of and participation in the conspiracy, serves to bolster the prima facie case. Thus, we find the state provided sufficient evidence to show a prima facie case of conspiracy.

The trial court correctly determined that the statements made by Branigan in the recorded conversation constitute non-hearsay statements by a co-conspirator. However, Schmolke's statements, made while acting as an informant, cannot be considered non-hearsay co-conspirator statements

pursuant to La. Code Evid. art. 801(D)(3)(b). Nevertheless, we agree with the trial court's ruling and rationale admitting Schmolke's statements in the recorded conversation into evidence. Schmolke's statements were offered to provide context for Branigan's statements and not to prove the truth of the matters asserted therein. Furthermore, the court cautioned the jury that Schmolke's statements in the recordings were to be considered only to place Branigan's statements in context. Accordingly, we find that Schmolke's statements are not hearsay. *See* La. Code Evid. arts. 801(C) & (D)(3)(b). This argument has no merit.

Right of Confrontation

Additionally, defendant argues that he was denied his right of confrontation by the admission of recorded conversations. In support of his claim, he cites Schmolke's suicide prior to trial, and Branigan and Melissa Tsolainos's assertion of their Fifth Amendment privilege against incriminating themselves and their refusal to testify.

In **Ohio v. Roberts**, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Supreme Court resolved the relationship between the rules of hearsay and the Confrontation Clause. The Court held:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without

> more in a case where the evidence falls within a firmly rooted hearsay exception.

Ohio v. Roberts, 448 U.S. at 66, 100 S.Ct. at 2539.

The co-conspirator's declaration is a firmly rooted hearsay exception. State v. Ester, 458 So.2d 1357, 1365 (La. App. 2nd Cir. 1984), *writ denied*, 464 So.2d 313 (La. 1985). From our review of this record, we find that the contested statement in the instant case was a co-conspirator's statement with referential "indicia of reliability." Thus, its admission into evidence was not a violation of the confrontation clause. This argument lacks merit.

ASSIGNMENT OF ERROR NUMBER FIVE
ADMISSIBILITY OF EVIDENCE OF
DEFENDANT'S PAST DRUG USE

In this assignment of error, the defendant contends that the trial court erred in allowing the state to introduce evidence of the defendant's prior crack cocaine usage. Defendant objects to the court's ruling that defendant "opened the door" to the issue of his drug use and maintains that this evidence only showed he is a "bad man" and was not relevant. Defendant also contends that the trial court erred in allowing the state to use Doctors Salcedo and Thompson as rebuttal witnesses.

In response to the defendant's pleas of not guilty and not guilty by reason of insanity in this case, the trial court appointed Dr. John Thompson and Dr. Raphael Salcedo to examine the defendant and determine his competency to stand

trial and his sanity at the time of the commission of the alleged offense. After hearing evidence from Dr. Thompson and Dr. Salcedo, the trial court concluded that defendant was competent to proceed. During his interviews with each doctor, defendant admitted to prior use of crack cocaine, as recently as the day he met with Branigan, within a month or so of the victim's death. Defendant indicated he was a recreational cocaine user and consumed approximately $200.00 worth of cocaine any given weekend.

At trial of this matter, the defendant presented the testimony of Dr. Edward W. Carnes, a human factors engineer. Dr. Carnes was accepted as an expert ergonomist and human factors engineer for purposes of his testimony. His task was to consider the potential for human error, specifically, control misapplication, during defendant's use of the car during this incident. In connection with his evaluation, Dr. Carnes examined the design of other Buick Skylarks; reviewed the depositions of Clarissa Tsolainos, Connie Deville, and Betty Ann Rodriguez; the police reports; the defendant's recorded statements; the reports of the sanity commission doctors; and a videotape of the car and the scene of the incident.

Dr. Carnes testified regarding the design of the Skylark, observing that the levers for the windshield wiper and the gearshift were similar in size and shape, were located on the same side of the steering column, and operated in the same direction of movement. He opined these "design defects" could cause "control misapplication" with potential for operator error in reaching for one lever, but inadvertently hitting the other. He explained, if the operator intended to

push a lever up, the windshield wipers either activated, or the car would go into reverse, depending on the lever.

Dr. Carnes evaluated the situation considering defendant's account that immediately before the incident, the victim was yelling, hitting the car, and attempting to climb up the front end and that the defendant intended to back out of the driveway and leave. He opined that the defendant suffered from "hypervigilance" or panic caused by stress induced either by defendant's inadvertently engaging the windshield wipers, as claimed by defendant, or by the victim's actions. According to Dr. Carnes, the defendant's hypervigilant condition explains why defendant, in a state of confusion, was unable to stop the car during the incident. He opined that hypervigilance and control misapplication "are reasonable explanations for the incident." Dr. Carnes conceded, however, that "any stress" could have induced the hypervigilance.

During cross-examination, Dr. Carnes conceded that an intentional act could have caused the incident and related that the documents he examined contained "so many discrepancies" that it was hard for him to put it all together as a scientist. There was some reference to the emergency brake, but his understanding was that it was functional. Dr. Carnes indicated he was unaware that the defendant originally told Clarissa that a malfunction in the vehicle's emergency brake was the cause of the accident. There was no gas pedal-brake confusion.

Next, the defendant presented testimony from Dr. John Wilson, a psychologist. Dr. Wilson was asked to assess what, if any, psychological factors impacted defendant's behavior on the day of the incident, particularly in respect to operation of the Buick Skylark vehicle. Dr. Wilson concluded that defendant suffered from "post-traumatic stress disorder, chronic" and "generalized anxiety disorder, and dysphemia disorder (mild depression)." He concluded that those conditions were caused by the victim's history of addiction to prescription medications, heroin, and her behavior during that period of their lives.

In a hearing outside the presence of the jury, the court heard Dr. Wilson's testimony as to whether he considered relevant the information on defendant's drug use. He opined it was not, considering that he had no information that defendant used drugs on the day of the incident. Dr. Wilson conceded that crack cocaine was highly addictive. He further conceded, hypothetically, that if defendant had used crack cocaine as recently as a couple of weeks prior to the incident, withdrawal from the drug could have contributed to "defendant's rageful state" at the time of the incident.

At the conclusion of this hearing, the court found that:

> . . .the defendant cannot raise the issue of his mental state and preclude his relative recent use of crack cocaine which has a profound effect upon a person's mental condition and even outward manifestations of that condition.

Appendix A

> The court determines that the prior crack cocaine usage could be relevant on questioning this expert's report that was prepared in connection with these proceedings.

The court ruled that issues regarding the defendant's prior, but fairly recent, drug usage, and what effect, if any, it had on his actions on the date in question, were issues for the jury to decide.

Thereafter, the state notified the court and the defendant that it planned to call Drs. Salcedo and Thompson to rebut the defendant's evidence regarding his mental and emotional state at the time of the incident. The defendant objected and a hearing was held. The court heard testimony from Drs. Salcedo and Thompson outside the presence of the jury. Both doctors indicated that prior to examining the defendant they informed him of the non-confidential nature of the interview. During his examination with both doctors, the defendant indicated he recreationally used marijuana and crack cocaine. Both doctors testified regarding the possible effects of cocaine usage and withdrawal symptoms, and how they would impact the validity of the diagnosis of Drs. Carnes and Wilson. The doctors also testified regarding the defendant's state of mind at the time of the commission of the incident.

The defendant in this case entered a plea of not guilty and not guilty by reason of insanity. In connection with the pleas, the defendant presented expert testimony suggesting the cause of the incident was stress-induced hypervigilance. By entering this plea and presenting this defense, the

defendant tendered the issue of his mental state at the time of the incident. Therefore, Drs. Salcedo's and Thompson's testimony regarding their assessment of the defendant's mental condition at the time of the offense and any factors that would have directly affected it is genuinely relevant to the issue tendered to the jury. "By claiming, (sic) the benefits of his plea of insanity, he cannot offer that from the past or present which is favorable to his contention, but at the same time withhold from the jury's consideration (if the state offers it) that which is unfavorable to his plea." **State v. Brown,** 619 So.2d 692, 695-96 (La. App. 4th Cir. 1993). We agree.

This argument lacks merit.[17]

ASSIGNMENT OR ERROR NUMBER SIX MOTION FOR A NEW TRIAL

In this assignment of error, the defendant contends that the trial court erred in denying his second motion for a new trial in light of newly discovered evidence that Clarissa Tsolainos and George Deforrest presented perjured testimony at trial.[18] This evidence, the defendant contends, renders the

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17. In this assignment of error, the defendant also argues the state failed to provide **Prieur** notice regarding its intent to use evidence of his prior drug usage. The record in this case reveals this argument was not presented in the trial court. Because the defendant's basis for argument on appeal is different from the argument presented at the hearing below, this issue has not been preserved for appellate review and will not be considered. La. Code Crim. P. art. 841.

18. The defendant filed two motions for a new trial. In the first motion, the defendant sought a new trial based on allegations concerning juror Mark Berryhill.

state's overall evidence insufficient and warrants a new trial. Defendant further argues that the trial court erroneously acted as a thirteenth juror in deciding his new trial motion.

Grounds for seeking a new trial are set forth in La. Code Crim. P. art. 851. That article provides in pertinent part:

> The court, on motion of the defendant, shall grant a new trial whenever:
>
> * * * * *
>
> (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty. . . .

Thus, under Article 851(3), a new trial shall be granted when: "(1) new evidence was discovered after trial; (2) the new evidence is material; (3) the failure to discover the evidence was not due to a lack of diligence on the part of the defense; and (4) had the evidence been introduced, the verdict or judgment of guilty probably would have been changed." **State v. Watts**, 2000-0602, p. 6 (La. 1/14/03), 835 So.2d 441, 447. In evaluating whether or not the newly discovered evidence warrants a new trial, the test to be employed is not simply whether another trier of fact might render a different verdict, but whether the new evidence is so material that it

should produce a verdict different from that rendered at trial. **State v. Henderson**, 99-1945, p. 15 (La. App. 1st Cir. 6/23/00), 762 So.2d 747, 758, *writ denied.* 2000-2223 (La. 6/15/01), 793 So.2d 1235. The trial court's denial of a motion for new trial will not be disturbed absent a clear abuse of discretion. **State v. Maize**, 94-0736, pp. 27-28 (La. App. 1st Cir. 5/5/95), 655 So.2d 500, 517, *writ denied*, 95-1894 (La. 12/15/95), 664 So.2d 451.

At a hearing on the second motion for a new trial, Cherie Breaux, an acquaintance of Clarissa, testified that during a conversation at a birthday party of Clarissa's younger brother Stephen, Clarissa stated "George [Deforrest] lied for me on the stand and I owe him $20,000 or a truck. . . ." Although Breaux surmised that Clarissa was referring to the defendant's criminal trial, Breaux admitted, on cross-examination, that Clarissa did not mention a specific trial, criminal or civil. Breaux further testified that Clarissa did not reveal the substance or nature of the lie.

David Showalter testified that he overheard the conversation wherein Clarissa told Breaux that Deforrest lied for her in court. Like Breaux, Showalter indicated that Clarissa did not specifically say which court proceeding she was referring to and did not provide the substance of the lie.

Next, Jessie Polk, whose wife is an acquaintance of Clarissa, testified that once, while out partying, Clarissa indicated that she was not present when the defendant ran over the victim. On another occasion, according to Polk, when Clarissa was staying with him and his wife, she broke down and cried, stating that she had not witnessed the incident in question because she was not outside.

Appendix A

Sheree Bossier (Sheree), Mr. Polk's wife, testified that she and Clarissa became friends when Clarissa was placed in the Bossier home as a foster child back in 1994 or 1995. Bossier testified that on the day the incident occurred, she received a call indicating that Clarissa's mother had been injured. Sheree stated she and her mom went to the Morgan Bluff Road residence, and Stephen Tsolainos stated that when the incident occurred, "he had to run inside and get his sissy [Clarissa] to come outside because he was scared, he didn't know what to do." On cross-examination, when informed that Stephen provided a statement indicating that Clarissa was outside and questioned as to whether she misunderstood Stephen's comment to her, Sheree indicated she heard him clearly, but stated that Stephen "could have possibly been confused too." Sheree further testified that on at least three separate occasions Clarissa told her that she was not outside when the incident occurred.

Pat Bossier, Sheree's mother and an acquaintance of the Tsolainos family, also testified. Mrs. Bossier testified that she was present on the night of the incident when Stephen indicated that he had to run inside and get Clarissa after his dad ran over his mom. She further testified that Clarissa, on one other occasion, stated that she and Deforrest were not outside when the incident occurred.

In opposition to the motion for new trial, the state presented the testimony of Det. Juge. In his testimony, Det. Juge indicated that shortly after arriving at the Morgan Bluff Road residence on the night of the incident, he obtained recorded statements from Clarissa, Deforrest, and Stephen. Det. Juge testified that every statement taken in connection

with his investigation of the incident, including the statement taken from the defendant, indicated Clarissa was outside.

Det. Juge testified that Stephen, in his statement, indicated, "Clarissa saw the wreck." Det. Juge further testified that in her statement on the night of the incident, Clarissa indicated that she had been outside when the defendant ran over the victim. She also indicated that she and her sister, Stephanie, were also hit with the vehicle. Det. Juge further testified regarding the taped statement he took from the defendant on the night of the incident. In the statement, while describing the verbal encounter between him and the victim, the defendant indicated, "I was trying to tell Clarissa who I was yelling at," thereby indicating that Clarissa was outside.

Clarissa also testified at the hearing. She denied ever telling anyone she was not outside. Clarissa testified that her prior testimony at the defendant's trial was truthful. Clarissa explained that the testimony of the defendant's witnesses at the hearing was untrue and motivated by money.

A copy of a tape of the call Clarissa made to 911 was introduced at the hearing and played for the court. During the call, Clarissa indicated that her father ran over her mother. Clarissa told the operator that the vehicle also struck her and her sister.

Deforrest testified he was not given anything for his testimony at the defendant's trial. He further testified that Clarissa was outside when the incident occurred and went inside afterwards.

At the conclusion of this hearing, the trial court denied the motion for a new trial. The trial court provided oral reasons for its ruling.

Subsequently, on August 19, 2002, in connection with his contention that Clarissa and Deforrest provided perjured testimony at his trial, the defendant filed a Motion to Reset the Motion for New Trial for the Taking of Additional Evidence. On February 25, 2003, the trial court reopened the hearing.

At the February hearing, Clarissa, now a witness for the defense, testified that she was on probation when she testified at the first new trial hearing. Clarissa testified that, as she understood it, there was a warrant for her arrest outstanding at that time. She stated that on the date of the first hearing she spoke with her probation officer prior to appearing to testify. Clarissa claimed her probation officer, Dena Lopez, asked Clarissa if she could pass a drug screen that day. Clarissa responded that she would not. Clarissa testified that she would not have been able to pass a drug screen because she was under the influence of marijuana and Xanax at that time.

Clarissa also testified regarding a written statement she provided to defense counsel on January 14, 2002. In her statement, Clarissa admitted she was under the influence of Xanax at the first hearing. She further indicated that the assistant district attorney who prosecuted the defendant's case had her warrant lifted and "was giving [her] a second chance since [she] had violated probation." Clarissa also indicated she could have said she "lied on the stand" as Cherie Breaux

indicated in the first hearing. Clarissa explained that she did not recall exactly what she lied about, except her statement indicating that her mother hadn't been drinking on the day she was killed. Clarissa went on to admit that the victim "had become an alcoholic at the time. Not on heroin but she did drink a lot." Towards the end of the statement, Clarissa indicated that she could have said that Deforrest wanted her to give him some money or buy him a truck, but she did not recall making that statement.

On cross-examination, Clarissa again admitted that she had lied about the victim's alcohol consumption on the day of the incident. However, Clarissa unequivocally stated that she did not lie about what she saw that evening. Clarissa further stated that her offer to give Deforrest money or help him get a truck was unrelated to his testimony at the defendant's criminal trial.

Sam Gebbia, a felony investigator for the District Attorney's office, accompanied Clarissa to see her probation officer on the day of the first hearing. He testified that Clarissa never indicated that she would have failed a drug screen.

On the second day of the hearing, Dena Lopez, Clarissa's probation officer, testified that she met with Clarissa on November 26, 2001, to discuss the conditions of her probation. During this meeting, Clarissa was five or six months pregnant. Clarissa told Lopez that she violated her probation because she did not have any money to pay her fines and monthly probation fees. Clarissa further explained the additional hardships she was experiencing, particularly putting her child up for adoption in California. Lopez

testified, although the prosecutor in the defendant's case had called Lopez and asked for leniency in regards to Clarissa's probation violation, that she would have given Clarissa a second chance anyway. Lopez denied Clarissa ever stated that she would fail a drug screen.

On appeal, the defendant alleges that the testimony presented at the motions for a new trial, particularly Clarissa's testimony regarding the victim's alcohol consumption, probably would have produced a different verdict. He asserts, had the jury been aware of the state of the victim's alcohol consumption, it probably would have concluded the victim was the aggressor in the incident, which, he avers, would have resulted in a different verdict. The defendant further contends that had the jury been aware of Clarissa's promise to give Deforrest money, it would have possibly disregarded Deforrest's testimony regarding the comment made by the defendant upon exiting the vehicle.

In its initial ruling on the second motion for new trial, the court stated:

> It is the duty and responsibility of the court to evaluate the witnesses' testimony and give what weight the court feels that that testimony deserves. Thus, it becomes an issue of credibility of the witnesses and also not only for the hearing that is before the court today; but the credibility of the witnesses that testified before the trier of facts, which is a jury of twelve persons, here in this very courtroom.

> The court after giving the credit that it feels the witnesses deserves comes to the conclusion that the defendant is not entitled to a new trial.

As previously noted, when ruling on a motion for new trial based upon newly discovered evidence, a trial court's duty is not to weigh the new evidence or "determine what is true or false in light of the additional information." **State v. Watts**, 2000-0602 at pp. 8-9, 835 So.2d at 448. Thus, it appears the trial court applied an incorrect standard in deciding this motion for a new trial.

However, the trial court further found that the evidence of Clarissa's testimony would not change the jury's verdict, a finding based on the correct standard. The court did not find Clarissa's testimony regarding the victim's alcohol consumption to be material because this issue was adequately put before the jury at trial. In addition, the court concluded that evidence presented, regarding whether Clarissa gave or intended to give Deforrest money, did not show that Clarissa was compensating Deforrest for his testimony at the criminal trial.

We find no error in these conclusions. Although Clarissa admitted she lied about the victim's alcohol consumption, we note, as did the trial court, this issue was already before the jury by virtue of Dr. MacKenzie's testimony and the autopsy report. Everyone who was present at the scene, including Clarissa and Deforrest, testified that the victim was angrily beating on the hood and the windshield of the vehicle while yelling profanities. Even in light of this evidence and the trial court's instruction on the possibility of the responsive

verdict of manslaughter, the jury convicted the defendant of second degree murder. Thus, it is clear that evidence of the victim's alcohol use, and Clarissa's admitted perjury on that issue, would not have changed the outcome.

As to the testimony indicating that Clarissa allegedly stated she was not outside, we note that, from the moment she made the 911 call until her testimony at the second motion for a new trial, Clarissa never wavered in her claim that she personally witnessed the incident. Likewise, Deforrest, in his statement to police on the night of the incident, his subsequent testimony at the defendant's trial, and his testimony at the motion for new trial, consistently indicated that Clarissa was outside during the incident. Given the consistency of this evidence, and the other evidence submitted at trial, we are unable to conclude that the contrary testimony, of individuals admittedly acquainted with the defendant, would have produced a different verdict or would have changed the jury's verdict.

Therefore, after a careful review of the record, we do not find that defendant has met all the requisites for the granting of his motion for new trial based upon newly discovered evidence. Although the trial court may have articulated the incorrect standard in its reasons for denying the motion, the end result was correct. The defendant's motion for a new trial was properly denied. This assignment of error lacks merit.

Appendix A

ASSIGNMENT OF ERROR NUMBER SEVEN
BRADY VIOLATIONS

In this assignment of error, with little or no elaboration or argument, the defendant lists twenty-two instances wherein he contends that the state withheld or suppressed information favorable to him, in violation of open-file discovery and **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The defendant argues that the state's failure to disclose the referenced items warrants reversal of his conviction. In response, the state avers that the items referred to by the defendant (1) were produced at trial and do not constitute the sort of Brady violations discussed in the jurisprudence, (2) were clearly not relevant or not Brady material, or (3) did not exist or were events that occurred after the trial of this matter.

The purpose of pretrial discovery procedures is to "eliminate unwarranted prejudice [to a defendant] which could arise from surprise testimony." **State v. Mitchell**, 412 So.2d 1042, 1044 (La. 1982). Discovery procedures enable a defendant to properly assess the strength of the state's case against him in order to prepare his defense. **State v. Roy**, 496 So.2d 583, 590 (La. App. 1st Cir. 1986), *writ denied*, 501 So.2d 228 (La. 1987). If a defendant is lulled into a misapprehension of the strength of the state's case by the failure to fully disclose, such a prejudice may constitute reversible error. **State v. Ray**, 423 So.2d 1116, 1118 (La. 1982).

Under the United States Supreme Court decision of **Brady**, the state, upon request, must produce evidence that

is favorable to the accused where it is material to guilt or punishment. This rule has been expanded to include evidence that impeaches the testimony of a witness where the reliability or credibility of that witness may be determinative of guilt or innocence. **Giglio v. U.S.**, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Where a specific request is made for such information and the "subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge" for an in camera inspection. **U.S. v. Agurs**, 427 U.S. 97, 106, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976); *see* **State v. Cobb**, 419 So.2d 1237, 1241 (La. 1982).

The test for determining materiality was firmly established in **U.S. v. Bagley**, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), and has been applied by the Louisiana Supreme Court. **State v. Rosiere**, 488 So.2d 965, 970 (La. 1986). The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. **Bagley**, 473 U.S. at 682, 105 S.Ct. at 3383.

After a thorough review of the record for each alleged violation, and consideration of the applicable legal precepts, we find that the defendant has failed to demonstrate any prejudice to his case or that the information would have changed the result of the trial. In both his original and reply

briefs, the defendant merely cites what he alleges to be violations of **Brady** and open-file discovery procedures, then generally asserts that he was prejudiced. The defendant fails to specify what "favorable evidence" was withheld from him, and does not provide any focused argument on how the alleged breaches specifically prejudiced his case or how disclosure to defense counsel would have changed the result. Even if a discovery or **Brady** violation did occur in any of the instances referenced by the defendant, it would not constitute reversible error without actual prejudice to the defendant's case. *See* **Brady v. Maryland**, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); *see also* **State v. Francis**, 2000-2800, pp. 5-6 (La. App. 1st Cir. 9/28/01), 809 So.2d 1029, 1033. Furthermore, the record does not reflect any manner in which defendant might have been lulled into a misapprehension of the strength of the state's case. For these reasons, we find that this assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER EIGHT
SUPPRESSION OF DEFENDANT'S CONFESSION

In this assignment of error, defendant claims his taped statement of July 20, 1998, following his arrest for the murder charge, should have been suppressed. Defendant claims the statement was involuntary because it was made in response to inducements by Det. Juge. Defendant also claims the statement itself contains a number of bizarre references, which should have caused serious concern for his state of mind.

Appendix A

Prior to trial, the defendant filed a motion to suppress his taped statements.[19] Along with several complaints regarding the chain of custody, problems with the transcripts, and condition of the tapes, the defendant argued the statements were in violation of his constitutional rights. As to the July 20, 1998 statement, the defendant argued it should have been suppressed because (1) it was induced by a promise to release his girlfriend, and (2) he was under the influence of an obvious mental impairment at the time he gave the statement. Following a hearing, the trial court denied the motion. Defendant filed a supervisory writ application with this court seeking review of the trial court's ruling on the motion to suppress. In an unpublished decision, this court denied the writ application. State v. Tsolainos, 99-2401 (La. App. 1st Cir. 10/08/99). Defendant then filed a supervisory writ application with the supreme court, which also was denied. State v. Tsolainos, 99-2885 (La. 10/11/99), 748 So.2d 457.

Although a pretrial determination of the admissibility of evidence does not absolutely preclude a different decision on appeal, "judicial efficiency demands that this court accord great deference to its pretrial decisions on admissibility unless it is apparent, in light of a subsequent trial record, that the determination was patently erroneous and produced an unjust result." **State v. Johnson**, 438 So.2d 1091, 1105 (La. 1983); *see* **State v. Humphrey**, 412 So.2d 507, 523 (La. 1982) (on rehearing).

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19. The defendant made two separate taped statements. His first statement was made on July 7, 1998, following his arrest on the conspiracy charges. The second taped statement, on July 20, 1998, was made following the defendant's arrest for the instant offense.

By this assignment of error, defendant again seeks review of the trial court's ruling denying his motion to suppress his July 20, 1998 taped statement.[20] However, the assignment of error presents no new argument. The record in this case fully supports our previous decision on the issue presented in the writ application and is devoid of any additional evidence that would lead us to change the conclusion we previously reached. Accordingly, we maintain our previous finding that the defendant's statement was freely and voluntarily given. This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER NINE
MOTION TO QUASH INDICTMENT

In this assignment of error, the defendant contends that the trial court erred in failing to grant his motion to quash the indictment. The motion was based on the state's failure to record or transcribe the grand jury proceedings. The defendant, who wished to search for inconsistencies in testimony, argues that the state's failure to record and transcribe the grand jury proceedings in this case warrants reversal of his conviction.

On October 5, 1999, the defendant filed a Motion and Order for In Camera Inspection of Grand Jury Testimony based upon alleged inconsistent statements by Detective Juge and Clarissa Tsolainos. In response to this motion, the state, in its Answer to Defendant's Request for Supplemental

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20. Although the defendant mentions both of his statements in his assignment of error, he provides argument on his second statement only. Thus, the defendant has abandoned any error assigned to the first statement.

Discovery, indicated that a transcript of the grand jury proceedings did not exist. Consequently, the defendant filed a Motion to Re-urge the Motion to Quash the Indictment alleging that the state's failure to record the grand jury proceedings violated several constitutionally guaranteed rights.[21] A hearing was held on October 12, 1999, at the conclusion of which the trial court denied the motion, stating:

> *** In regard to the motion to reurge the motion to quash the indictment on the grounds that the grand jury proceedings involving this case were not transcribed and thus putting the defendant at a disadvantage, the Court would reflect that a grand jury is an accusatory body. There is no particular provision in the law that absolutely requires all proceedings of a grand jury be transcribed. And thus the Court, when confronted with a situation where there's no transcript of the grand jury proceedings involving the indictment in this case, the Court cannot order something to be produced that doesn't exist.
>
> And the Court finds further that in light of the law in not requiring it and that it's discretionary and that based on the argument that historically the proceedings of the grand jury are not transcribed, this Court denies the motion to quash the indictment.

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21. In his motion to quash, the defendant stated, "[w]hen the State chose not to transcribe the grand jury proceedings, thereby assuring that Mr. Tsolainos could not receive a copy, they violated the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution."

The defendant's claim is unfounded. The trial court correctly noted that there is no provision in the law that requires all grand jury proceedings be recorded or transcribed. La. Code Crim. P. art. 433, which lists the persons who "may" be present at the sessions of the grand jury, is permissive. The language of the statute merely allows for "a person sworn to record the proceedings of and the testimony given before the grand jury" to be present during grand jury sessions. La. Code Crim. P. art. 433; *see also* La. Code Crim. P. art. 441. Contrary to the defendant's assertions, nothing in the language of the statute or in any existing Louisiana jurisprudence mandates the presence of such an individual or that the proceedings be recorded.

Moreover, as a general rule, grand jury proceedings are to be kept secret. **State v. Ates**, 418 So.2d 1326, 1329 (La. 1982). "While there may be instances in which a party's need for grand jury materials outweighs the need for continued secrecy, that need must be demonstrated with particularity." **State v. Sims**, 32,461, p. 3 (La. App. 2nd Cir. 10/27/99), 745 So.2d 151, 155, *writ denied*, 99-3384 (La. 5/12/00), 762 So.2d 71, citing **State v. Trosclair**, 443 So.2d 1098, 1103 (La. 1983), *cert. dismissed*, 468 U.S. 1205, 104 S.Ct. 3593, 82 L.Ed.2d 889 (1984).. The burden is on the party requesting the transcript to show great prejudice or injustice. A general request for transcripts "does not satisfy the requirement of demonstrative particularized need." *Id.*

We cannot find that the defendant's request to inspect the grand jury transcripts, wherein he sought to discover whether any inconsistent statements existed, sufficiently meets the threshold requirement of showing a particularized

need. Accordingly, the defendant has failed to show how the absence of recorded or transcribed proceedings prejudiced his constitutional rights or warranted a reversal.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TEN
ERRORS PATENT

In his final assignment of error, the defendant requests that this court examine the record for errors patent. Because this court routinely reviews the record for errors patent, such a request is unnecessary. Under La. Code Crim. P. art. 920(2), our patent error review is limited to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After review of the record in these proceedings, we find no errors patent.

For the foregoing reasons, defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.

APPENDIX B — MINUTES OF TRIAL COURT REGARDING SENTENCING

Wednesday, April 26, 2000

COURT MET THIS DAY PURSUANT TO ADJOURNMENT, PRESENT AND PRESIDING, HIS HONOR, DONALD M. FENDLASON, JUDGE DIVISION "H", RONALD T. GRACIANETTE AND SCOTT GARDNER, ASSISTANT DISTRICT ATTORNEY'S, RODNEY J. STRAIN, JR., SHERIFF AND MALISE PRIETO, CLERK OF COURT (BAILIFF, CHERYL HANSON AND COURT REPORTER, CYNTHIA GEBBIA)

290874H

STATE OF LOUISIANA

VS

PANOS TSOLAINOS

The defendant being present in open Court attended by his Counsel, Robert Stern and Kim Abramson and this matter being on assignment for a motion for New Trial, the Defense at this time request the sequestration of all witnesses, which Court so ordered and same was done.

The Defense at this time read into the record items which he requested that the Court take Judicial Notice of and the Court so noted.

Appendix B

The Defense at this time offered, introduced and filed into evidence the following item:

D-14 Transcript from the trial of Gerald Brannigan and Melissa Tsolainos held on January 26, 2000

Evidence was heard on behalf of the Defense with the following witness giving testimony:

1. Ron Frazier

The Defense at this time offered, introduced and filed into evidence the following items:

D-1 St. Tammany Parish Sheriff's Office Case Resume for Item #07-0318-98

D-2 Det. Scallan's field notes regarding Item 87-01318-98

D-3 Transcript of statement taken from Joy Kahl on February 15, 2000

D-4 Transcript of statements taken from Mark B. Berryhill on February 21, 2000 and on February 29, 2000

Appendix B

Wednesday, April 26, 2000

D-4-T Envelope containing the audio tape of the statements taken from Mark Berryhill on February 21, 2000 and February 29, 2000 and the statement taken from Joy Kahl on February 15, 2000

D-5 Handwritten statement taken from Cheryl Johnson on February 24, 2000

D-6 Extract of Minute Entry from #305319 dated November 3, 1999, State of La. vs. Cheryl Johnson

D-7 Copy of incident report from Pearl River County, Mississippi in regards to Jason Turner and Charles Schmolker, Case #MR140-95

D-8 Copy of Indictment from Pearl River County, Mississippi and Order of Nolle Prosse in regards to Charles Schmolker, Cause #8463-1

D-9 St. Tammany Parish Sheriff's Office Incident report on death of Charles Schmolke

D-10 Corornor's report on death of Charles Schmolke

D-11 Copy of pages from the PDR on the drug Xanax

D-12 Copy of divorce of Mark B. Berryhill #80270

D-13 Copy of divorce of Mark B. Berryhill #92-11976

Appendix B

Evidence was heard on behalf of the Defense with the following witnesses giving testimony:

2. Mark Berryhill

3. Joy Kahl

4. Cheryl Johnson

This being the noon hour, Court recessed for lunch.

The defendant being present in open Court attended by his Counsel, Robert Stern and Kim Abramson, argument was heard on behalf of the Defense and the State and submitted to the Court and Court recessed briefly.

The defendant being present in open Court attended by his Counsel, Robert Stern and Kim Abramson, Court at this time read into the record his reasons for judgment and filed same in written form. Court denied the

Wednesday, April 26, 2000

Motion for New Trial.

The Defense at this time waives formal delays in sentencing; whereupon Court imposed the following sentence:

PANOS TSOLAINOS, being over the age of 17 years of age and having previously been found guilty by a Jury of having violated R.S. 14:30.1 by committing second degree

murder of Deborah Tsolainos, Court sentences the defendant to serve a period of life imprisonment at hard labor without the benefit of parole, probation or suspension of sentence.

Upon motion of the Defense, Court ordered the defendant be held in the St. Tammany Parish Jail until Wednesday, May 3, 2000.

Court advised the defendant of the time limitations in which to file any Application for Post-Conviction Relief.

The Defense informed the Court of their intent to file a motion for Appeal, which Court will grant when the written motion is filed.

APPENDIX C — VEDICT OF THE JURY

VEDICT OF THE JURY

WE, the jury, find the defendant, PANOS TSOLAINOS,

Guilty

s/ [illegible]
FOREPERSON

October 23, 1999
DATE
COVINGTON, LOUISIANA

NUMBER: 290874

DIVISION: "H"

22nd JUDICIAL DISTRICT COURT

PARISH OF ST. TAMMANY

STATE OF LOUISIANA

s/ Connie Mays
Deputy Clerk

STATE OF LOUISIANA

VERSUS

PANOS TSOLAINOS

FILED: October 23, 1999

Appendix C

POSSIBLE VERDICTS

GUILTY;

GUILTY OF MANSLAUGHTER;

NOT GUILTY.

APPENDIX D — INDICTMENT FILED AUGUST 13, 1998

STATE OF LOUISIANA
Parish of St. Tammany

Twenty-Second Judicial District Court _____Term, 19__.

The Grand Jurors of the State of Louisiana, duly impaneled and sworn in and for the body of the Parish of St. Tammany, in the name and by the authority of the said State, upon their oath find and presents:

That one, *PANOS TSOLAINOS* late of the Parish of St. Tammany, on the *19TH* day of *JULY,* in the year of our Lord, one thousand nine hundred and *NINTY EIGHT*, in the Parish of St. Tammany, aforesaid, and within the jurisdiction of the Twenty-second Judicial District Court of Louisiana, for the Parish of St. Tammany: *4/26/99 amend to 14:30.1 Second Degree Murder*

R.S. 14:30 FIRST DEGREE MURDER, by killing DEBORAH TSOLAINOS in the second degree.

contrary to the form of the Statutes of the State of Louisiana in such cases made and provided, and against the peace and dignity of the same.

s/ [illegible]
District Attorney, 22nd Judicial
District of Louisiana

Appendix D

NO.

STATE OF LOUISIANA

versus

PANOS TSOLAINOS

INDICTMENT FOR

R.S. 14:30 FIRST DEGREE MURDER

A true bill

A TRUE BILL

s/ [illegible]
Foreman of the Grand Jury

APPENDIX E — FELONY BILL OF INFORMATION FILED AUGUST 6, 1998

FELONY BILL OF INFORMATION

STATE OF LOUISIANA – PARISH OF ST. TAMMANY

TWENTY-SECOND JUDICIAL DISTRICT

TO THE HONORABLE THE TWENTY SECOND JUDICIAL DISTRICT COURT OF LOUISIANA, sitting in and for the Parish of St. Tammany, comes now into open Court the undersigned District Attorney of the Twenty-Second-Judicial District of Louisiana, in the name and by the authority of said State, informs said Honorable Court.

That the person(s) named and identified below, late of the Parish of St. Tammany on or about the date below described, in the Parish of St. Tammany aforesaid and within the jurisdiction of the Twenty-Second Judicial District in and for the Parish of St. Tammany, State of Louisiana and contrary to the form of the Statutes of the State of Louisiana in such cases made and provided, and against the peace and dignity of the same did violate:

DEFENDANT'S NAME AND DATE OF BIRTH:

1. PANOS TSOLAINOS
2. MELISSA TSOLAINOS
3. GERALD BRANIGAN

DATE OF OFFENSE: BETWEEN THE 25TH DAY OF JUNE, 1998 AND THE 6TH DAY OF JULY, 1998

Appendix E

R.S. 14:26:30 CONSPIRACY TO COMMIT FIRST DEGREE MURDER, by conspiring to kill Deborah Tsolainos in the first degree.

s/ Walter P. Reed
WALTER P. REED
DISTRICT ATTORNEY
22ND JUDICIAL DISTRICT
STATE OF LOUISIANA

APPENDIX F — ORDER DENYING APPLICATION FOR REHEARING OF THE COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA FILED FEBRUARY 9, 2004

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

22nd Judicial District Court
Case #: 290874
St. Tammany Parish

RE: Docket Number 2000-KA-1664

STATE OF LOUISIANA

--Versus--

PANOS TSOLAINOS

On Application for Rehearing filed 01/13/2004

Rehearing *DENIED*

s/ Frank Foil
Frank Foil

s/ Brady M. Fitzsimmons
Brady M. Fitzsimmons

s/ E. James Gaidry
E. James Gaidry

Filed FEB 09 2004

s/ Christine L. Crow
Christine L. Crow, Clerk